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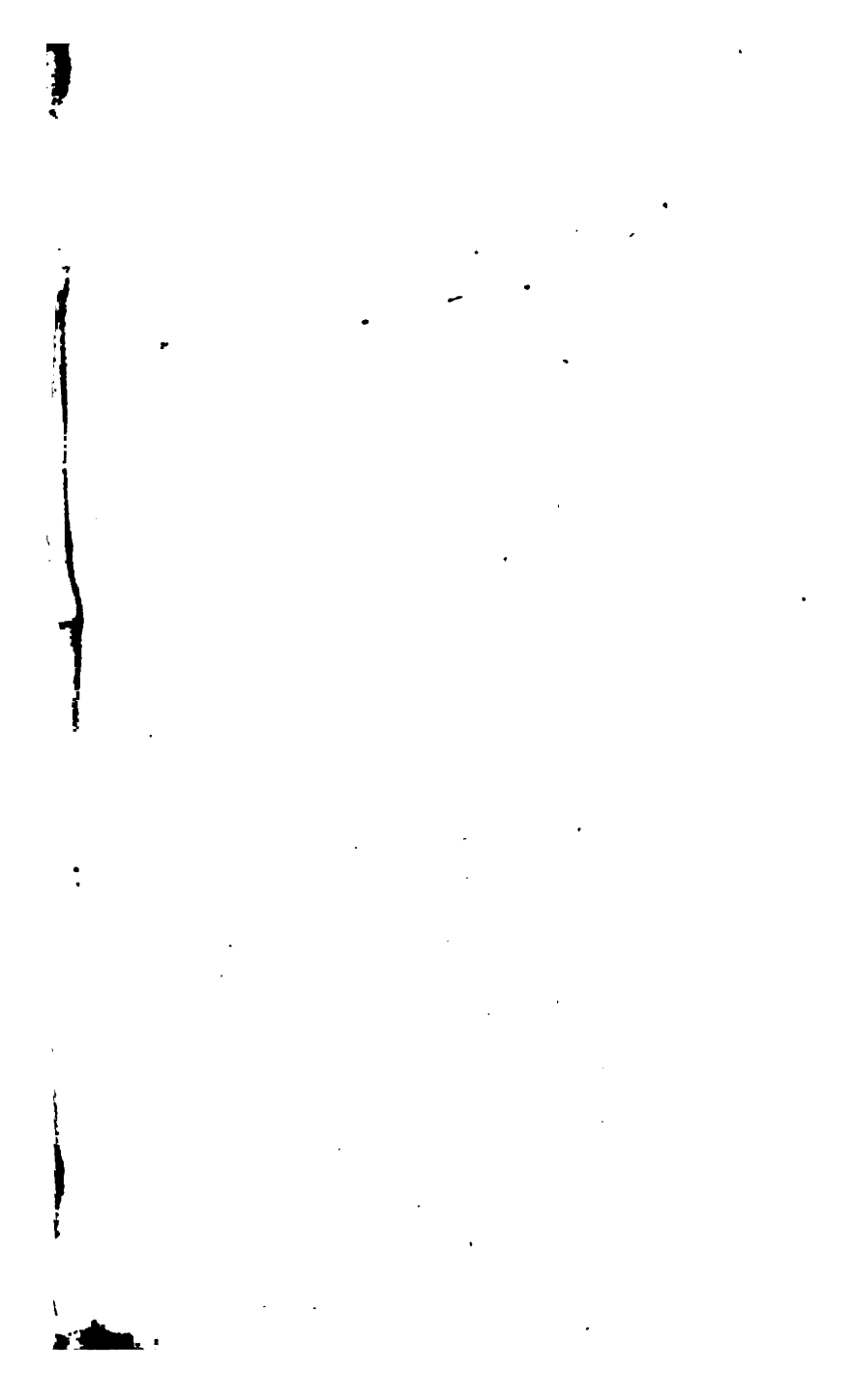
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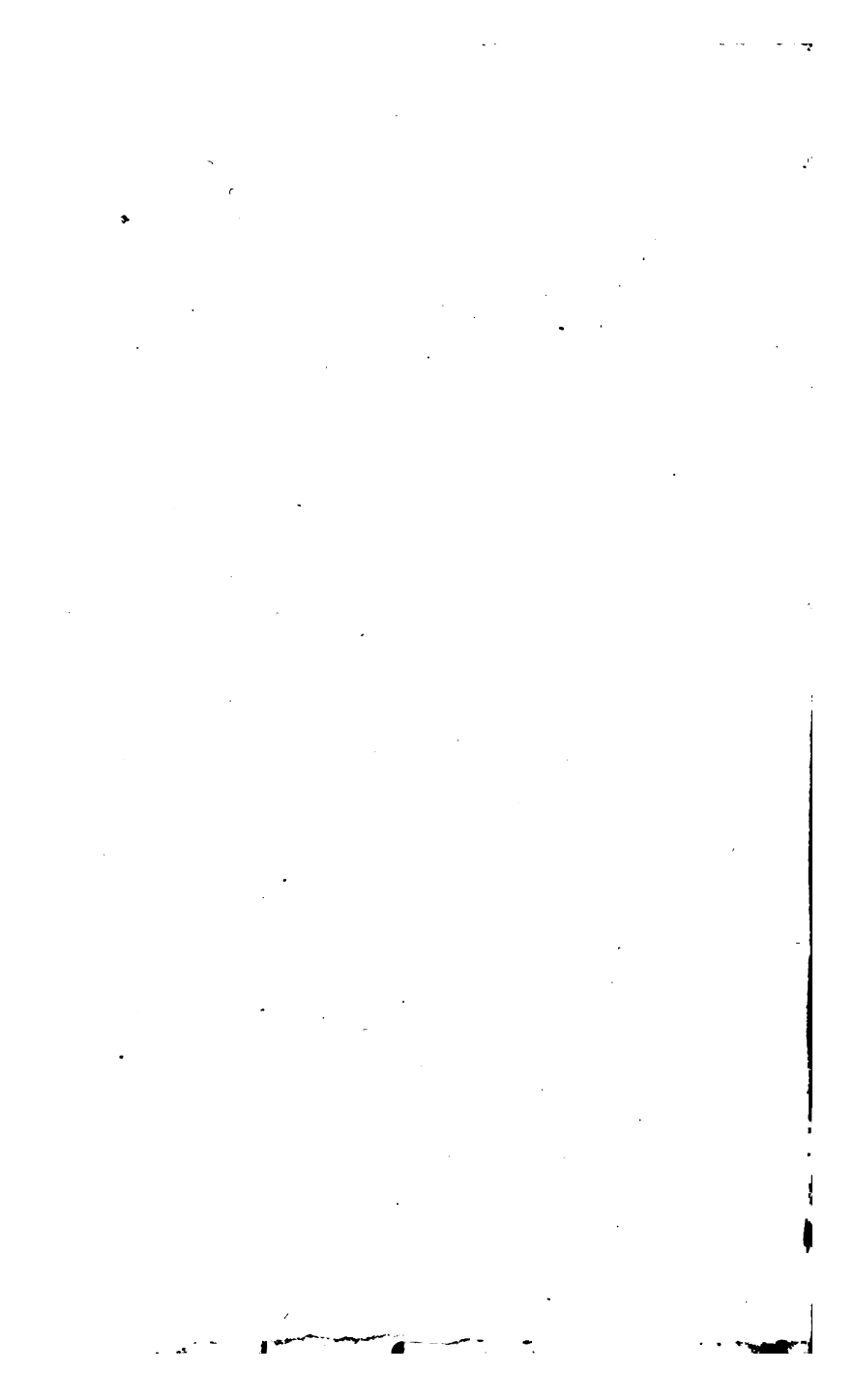
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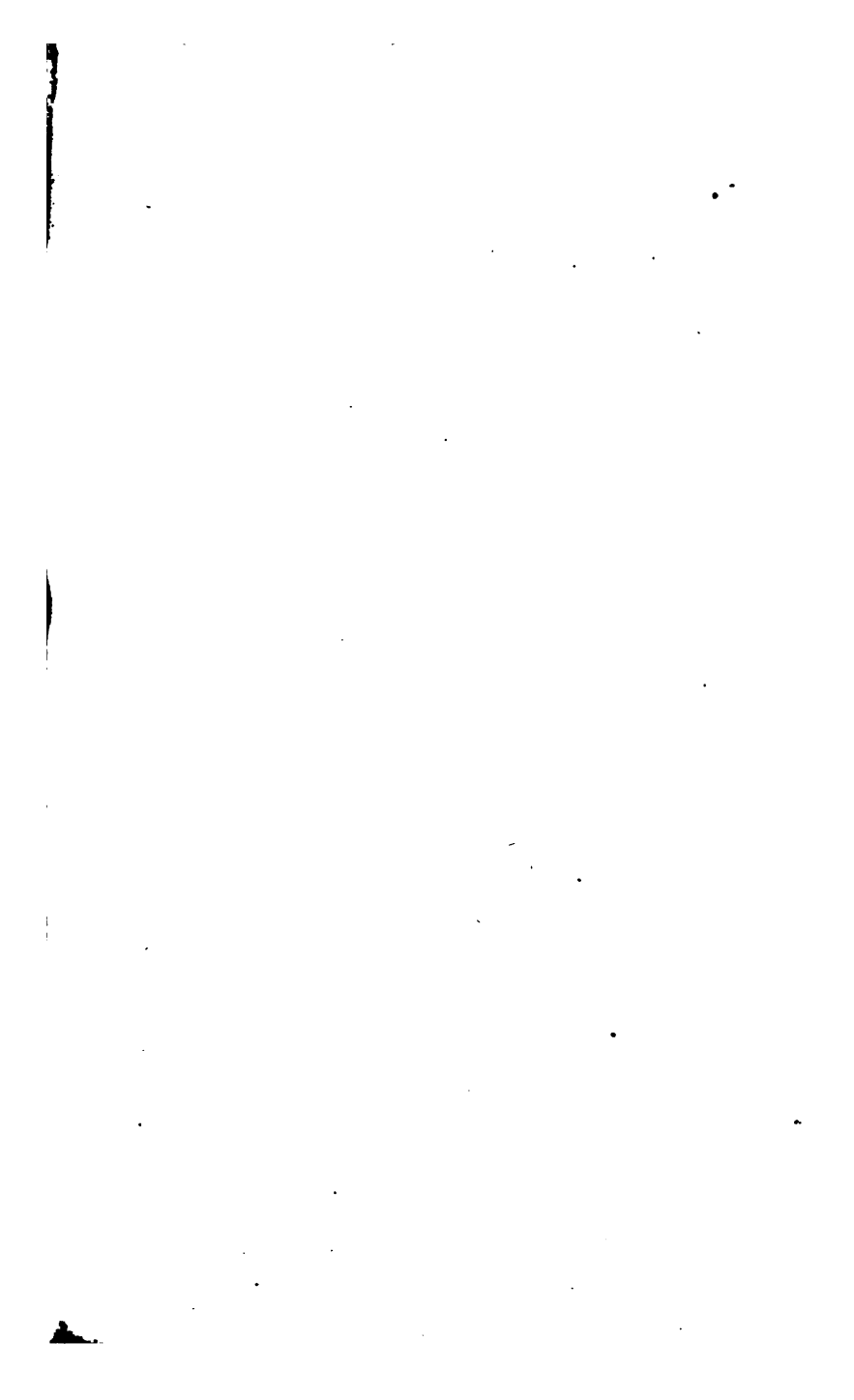
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J. H. 1825

PRACTICAL REMARKS ✓

ON THE PROCEEDINGS OF

GENERAL

COURTS MARTIAL.

BY

MAJOR VANS KENNEDY,

JUDGE ADVOCATE GENERAL OF THE BOMBAY ARMY.

The rules of property, rules of evidence, and rules of interpretation
in both courts (of law and equity) are, or should be, exactly the same :
both ought to adopt the best, or must cease to be courts of justice.

3 Blackstone, 434.

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PREFACE.

IT has been observed by Sir William Blackstone, that one of the greatest advantages of our English law is, that not only the crimes themselves which it punishes, but also the penalties which it inflicts, are ascertained and notorious : nothing is left to arbitrary discretion ; the King by his judges dispenses what the law has previously ordained ; but is not himself the legislator. How much, therefore, is it to be regretted, that a set of men (the military class), whose bravery has so often preserved the liberties of their country, should be reduced to a state of servitude in the midst of a nation of freemen ; for Sir Edward Coke will inform us, that it is one of the genuine marks of servitude, to have the law, which is our rule of action, either concealed or precarious ; “ *misera est servitus ubi jus est vagum aut incognitum.*” Mr. Tytler has opposed this opinion, but has at the

same time omitted the first part of the above quotation; and, though he has succeeded in shewing that Blackstone did not sufficiently discriminate between the Law Martial, as it existed previous to the passing of the Mutiny Act, and the Military Law, which has been subsequently established upon that act, he has completely failed in evincing that this Military Law is not *jus vagum aut incognitum*. There is, indeed, an evident fallacy which runs through the whole of Tytler's reasoning on this point. For, admitting that the modern British soldier, enjoying, in common with his fellow-subjects, every benefit of the laws of his country, is bound by the Military Code solely to the observance of the peculiar duties of his profession; a code which is simple in itself, reasonable in its enactments, easy in all its obligations, level to the meanest understanding, and more effectually promulgated and better known than any of the ordinary statutory laws of the realm; still if the main strength and force of a law consists in the penalty annexed to it, and that penalty be undefined or unknown, the law itself may be justly called concealed and precarious. For, as Blackstone observes, it is but lost labour to say, "do this," or "avoid that," unless we also declare,

“this shall be the consequence of your non-compliance.” Nothing is compulsory but punishment, and if that be not fixed and determined, the law itself must be considered to be vague and uncertain.

It will scarcely, however, be contended, that the penalties annexed to military offences are ascertained and notorious, and that nothing is left to arbitrary discretion. That this is the case was the point which Tytler, in censuring Blackstone, ought to have proved. But he has passed it over in silence; or rather he has produced the authority of Lord Loughborough in support of the opinion which he controverts: — “Breaches of military duty (said Lord Loughborough in Sergeant Grant’s case) are in many instances strictly defined; in all cases where a capital punishment is to be inflicted. * In other instances where the degree of offence may vary exceedingly, it may be necessary to give discretion with regard to the punishment; and in some cases it is impossible

* But no advantage can result from these breaches of Military duty being strictly defined, as their punishment is discretionary; the words of the Mutiny Act being, — “Shall suffer death or such other punishment as by a Court Martial shall be awarded.”

more strictly to mark the crime, than to call it a neglect of discipline." It is for this reason; it may be supposed, that of all the offences which a soldier may commit there are only two, and these of very rare occurrence, to which fixed penalties are annexed; and of such as an officer may commit seventeen, most of which may be evaded by the manner in which the charge is framed. It is singular, therefore, that Tytler should have asserted, that "the observance of the rules of discipline is enforced, either by plain, specific, and fixed penalties, appropriated to each offence, where such offence is of a positive nature, admitting of no gradations, or are left, in certain cases where the offence admits of degrees of criminality, to the decision of a Jury; in other words, of a Court Martial." It might be supposed that the writer of these words had never read the Mutiny Act, in which very few of the offences which an officer or a soldier may commit are specified, and still fewer of the penalties prescribed for these offences. The Articles of War are, it must be admitted, more specific with regard to the description of offences, but in almost every case the punishment is discretionary.

That the Military Law, therefore, is *just vagum* *et incognitum* cannot, I think, be controverted. It may, indeed, be safely affirmed that no person, however experienced in Courts Martial, could positively say what would be the punishment awarded for any specific offence, in any case where it was left at the discretion of the Court. But, notwithstanding, it cannot be said, in any sense of the term, that the military profession is *misera acervitus*. For no one will deny the justness of the following remark of Tytler; — “ War is a science which is not to be attained in any measure of perfection, without a regular initiation in its elements, and a long and uninterrupted exercise of its duties. Moreover, as there is in all liberal professions an *esprit de corps*, or general character of the body, which is known to have the most admirable effect in cherishing the laudable, and in suppressing the faulty or degenerate temperaments of the individuals which compose it, the principle of honour, which is the general character of the military order of citizens, could not have had its full operation, unless the military vocation had stood discriminated from all others, and ranked as a profession which gave to its members an appropriate character and name in civil society. Expediency,

therefore, and the wisest policy, having rendered the military condition a regular profession in all civilized nations, it became necessary that a body of men, who, from their number, were capable of becoming either a powerful instrument of good, or a formidable engine of evil, should be regulated by certain laws exclusively adapted and proper to their state. It was requisite that they should act with regularity, promptitude, and unanimity; and for that purpose it was essentially necessary that they should feel themselves perpetually under the strictest subordination, and yield the most perfect and absolute obedience to the command of their leaders. For this purpose, a sacrifice of a greater portion of the personal liberty of individuals is necessary in the profession of a soldier, than in any other of the employments of civil life; for without that sacrifice the army could not for a moment be kept together." *

It is in consequence of that principle of honour, that *esprit de corps*, so justly praised by Tytler, that law (in the usual acceptation of the term) is in a great degree unnecessary amongst military

* Tytler's Essay on Military Law, p. 2.

men; and that the uncertainty of military law, so far from being productive of a wretched state of servitude, is scarcely attended with any practical disadvantages. For it is not by punishment, but by an appropriate appeal to their honour, to their pride in their profession, that soldiers are to be governed. But effectual as these principles are, in preventing in general the occurrence of offences in the army, they will, in some cases, be found insufficient to restrain the passions and evil propensities of individuals. It must, at the same time, be admitted, that in the army, as well as in every other large body of men, offences are apt to become numerous, if the penalties annexed to their commission be not sufficiently known, or if these penalties be not severely and impartially enforced. Although, therefore, no inconvenience of material importance results from the present state of military law, it is still to be wished that it was rendered more definite and precise; not only with regard to the description of the offences, and the specific penalties to be awarded for each offence, but also with regard to the proper mode of conducting the proceedings of Courts Martial. It cannot but appear extremely singular, that, though the Mutiny Act has been annually enacted

For one hundred and forty years, so little has been done in respect to the first of these desiderata, and that Courts Martial should still have no other guide whatever for conducting their proceedings, than the experience of the Members, or knowledge of the Judge-Advocate. The unauthorized works of individuals may, indeed, describe the general outlines of a trial, but there are also a few disputed points of the greatest importance which can be only decided by the authority of the Sovereign or the Legislature.

Would members of Courts Martial, however, direct their attention to a consideration of Military Law; and at all times regulate their conduct by some one fixed and invariable principle, every inconvenience would be almost entirely obviated. But it, at present, too often happens that their decisions depend on the circumstances of each particular case, and not on any general and determined rule.* To assist, therefore, in the

* It might be supposed that officers, solemnly bound to administer justice, without partiality, favor, or affection, would never for a moment consider whether the parties on a trial were A, B, or C, D. But this indifference is scarcely to be

attainment of so desirable an object, by explaining, as concisely as possible, the principles of Military Law, and, by describing the different incidents of a trial at a Court Martial, is the intention of the following remarks. Nor shall I, perhaps, be accused of presumption, in thinking that the information, which observation and experience have enabled me to collect, may contribute materially to the removal of some of the difficulties and perplexities which so frequently occur at Courts Martial; at the same time I cannot but regret, that my residing at a presidency which is so miserably supplied with books, has prevented me from procuring such materials as might have rendered this work more complete.

As these remarks, however, aspire not to the praise of an original work, I have freely availed myself, as far as it suited my purpose, of what-

expected from human nature, and at Courts Martial, therefore, not only the final decision, but the arguments and opinions advanced in the course of a trial, and the attention paid to such as are adverse to the cause espoused, are too often materially influenced by preconceived opinion and improper bias. Whether this can, in any case, be correct, deserves the serious consideration of the reader.

ever, Anby, Sullivan, Tytler, or M'Arthur have written on the subject of Military Law. But it may be asked, why, since the citations of these authors are in very general circulation throughout the army, have I thought it necessary to enter into a discussion of the same subjects? The answer is obvious, that although these authors have exhibited a correct outline of the proceedings of a Court Martial, it still requires many fillings up in order to render it in any respect a complete picture. To these works, also, two much stronger objections occur; that they are more theoretic than practical, and that they are extremely deficient in method and arrangement. There is, besides, a peculiar infelicity in M'Arthur's voluminous work, as he has in it blended together in a most singular manner, which almost defies all reference, "the principles and practice of Naval and Military Courts Martial." If, however, any person would carefully extract from the treatises of M'Arthur and Tytler the parts which are purely practical, he would find his labour fully repaid by the information, though defective in many points, which he would thus acquire. But it cannot be expected that officers in general will take this trouble, or that they will read three or four

hundred pages in hopes of finding thirty or forty that might be useful. I have, therefore, endeavoured to save them this labour, and not to subject their patience to the severe task of perusing any remarks but such as apply to the practice of Courts Martial. In one or two places I may perhaps be accused of unnecessary prolixity, but the controverted points, on which I have dwelt, are of such material importance, and there being no competent authority by which they can be decided, it was impossible to avoid discussing them at considerable length.

I have also availed myself, as it will be observed, of the very few materials which I have been able to procure; — the Remarks of Sir Charles Morgan, prefixed to James's Edition of Tytler's Essay on Military Law, and the Trials of Lieut.-General Whitelocke, Lieut.-General Sir John Murray, and Colonel Quentin, which afford so full and satisfactory information respecting the practice of Courts Martial held at the Horse Guards, that the want of other materials is scarcely to be regretted. The authority of precedents, I am at the same time aware, is not always respected at Courts Martial; but, I think, that when officers

respect on the high rank of the officers who, in general, compose the Courts Martial held at the Horse Guards, several of whom, on the trials just mentioned, had held the situation of commander-in-chief,* the legal abilities of the Judge Advocate-General, the rank of the officers tried, and their being assisted by able counsel, they will admit that precedents drawn from such Courts are entitled to every authority. Nor can any remark be necessary to show what weight is due to every opinion delivered by one so distinguished for his knowledge of Military Law as Sir Charles Morgan. On two important points, however, I have been obliged to dissent from his opinions, but whether on sufficient ground the reader must decide.

I have thus endeavoured to compile a work which should contain, in as concise a form as possible, such information as might enable officers to perform without perplexity the duties of members

* At the trial of Lieut.-General Whitelocke, Sir William Meadows was President, and Lord Cathcart, Lord Lake, Lord Harris, Sir George Nugent, and Sir John Moore, were Members; and at Lieut.-General Sir John Murray's trial, Sir Alured Clark, President, and Lord Harris, General Nicholls, Sir George Beckwith, and Sir Samuel Achmuty, Members.

of Courts Martial. Nor have I restricted myself to military authorities alone; but, where those were silent, I have founded my remarks on the practice of courts of law; though I am aware that several officers entertain an opinion that law ought never to be mentioned at Courts Martial, at which honour and equity ought alone to preside. But Blackstone has very justly observed that "the rules of property, rules of evidence, and rules of interpretation in both courts [of law and equity] are, or should be, exactly the same, both ought to adopt the best, or must cease to be courts of justice;" and it will not be denied that the best rules can only be found in courts which have been for ages distinguished by the greatest abilities and legal experience. It is, however, merely in those cases where any deviation from the rules of law would render the proceedings of Courts Martial illegal, or where the practice of military law is not sufficiently determined, that I have referred to the practice of courts of law; and, as conciseness is my principal object, I have contented myself with merely stating the rule, without entering into any legal discussions whatever. To the same cause, the wish of being concise, must also be ascribed whatever positiveness or abruptness may appear in

the style of these remarks, and likewise the making use of another author's remarks, in several places, without naming him, or quoting his precise words. Nor has it, in consequence, been possible to cite the authority, particularly in the chapter on evidence, on which every assertion or remark is founded. But I am not aware of having made a single one respecting which a doubt could be entertained, without at the same time impartially stating the opinions opposite to those which I have advocated. I may, therefore, without hesitation request the confidence of the reader, and that he would, even in the passages which are unsupported by authorities, consider them to be correct, as being sanctioned either by authorities which I thought it unnecessary to cite, or by what I have myself observed to be the practice of Courts Martial during an experience of seventeen years.

Bombay, 15th January, 1824.

N. B. The editions referred to in the following Remarks, are of Adye's Treatise on Courts Martial, the sixth ; of Tytler's Essay on Military Law,

the first: and of Mr. M'Arthur's Practice of Naval and Military Courts Martial, the third. Blackstone's Commentaries the fifteenth by Christian; Hawkins's Pleas of the Crown the seventh, by Leach.

The quotations from the trials of Lieut.-General Whitelocke, Lieut.-General Sir John Murray, and Colonel Quentin, are cited from the proceedings of the respective Courts Martial, taken in short hand by Mr. Gurney.

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PRACTICAL REMARKS, &c.

CHAPTER I.

AUTHORITY OF GENERAL COURTS MARTIAL.

THE authority of Courts Martial being derived from an express act of the legislature, there can be no doubt that it has all the force and obligation of any other law which has been, or may be enacted. But the extension of their jurisdiction has been carefully restricted, as it is declared in the annual Mutiny Act, that "no man can be forejudged of life or limb, or subjected in time of peace to any kind of punishment within this realm by martial law, or in any other manner than by the judgment of his peers, and according to the known and established laws of this realm;" yet, it being requisite that military offences should be brought to a more exemplary and speedy punishment than the usual forms of the law will allow; it is enacted, that any person who is or shall be commissioned, or in pay, as an officer, or who is or shall be listed, or in pay, as a non-commissioned officer or sol-

dier, "shall commit certain offences, he shall suffer death, or such other punishment as by a Court Martial shall be awarded." The list of offences specified in this first clause of the Mutiny Act may be extended at the will and pleasure of His Majesty, who is empowered by the 35th clause "to form, make, and establish Articles of War, for the better government of His Majesty's forces; which Articles shall be judicially taken notice of by all judges, and in all courts whatever." But it is provided by the 38th clause, that no person shall by such Articles of War be subjected to any punishment extending to life or limb, within the united kingdom of Great Britain and Ireland, or any of the isles thereto belonging. In foreign parts, however, His Majesty may, by virtue of his prerogative, establish Articles of War, which shall subject offenders against them to capital punishment; and instances of the exercise of this power will be found in the 11th, 12th, 13th, 14th, 15th, and 19th articles of the 14th section of the Articles of War.*

* It must be observed, that it is the annual Mutiny Act for 1822 which is always referred to. The writer has quoted this act in preference to the one for the better government of the Company's forces, on account of its being more fully and carefully drawn up. But such provisions as are contained in both these acts are nearly the same, and a reference from one to the other is easy.

It hence appears that no persons are amenable to the jurisdiction of a Court Martial, except such as are either commissioned, listed, or in pay; yet there is a numerous class of people attached to every regiment, cantonment, or camp, who are indispensably necessary to the very existence of an army, as well as to the comfort and convenience both of officers and soldiers, but who are neither listed nor in pay as soldiers. To determine, therefore, how far this description of people, who are known under the general term of camp followers, are subject to military law, is a question of some importance. There can, however, be no doubt, that in all situations, where civil judicature is in force, camp followers, who are accused of any crimes punishable by the known laws of the land, must be given up to the civil magistrate. But there are also offences strictly military, such as disobedience of orders, neglect of duty, or insolence, which could not be punished by a civil court; and yet it would seem that a Court Martial cannot take any cognizance of them, as the offender is not properly amenable to its jurisdiction. The inconveniences and bad consequences arising from this circumstance have, if I am not mistaken, in more than one instance, led either to summary punishments or to an undue extension of military law. But whatever reasons may have prevented the subjecting of camp followers to military law in

time of peace, is expressly ordered by the 3d art. 24th sect. of His Majesty's Articles of War, that "all sutlers and retainers to a camp, and all persons whatever serving with our armies in the field, though not enlisted soldiers, are to be subject to orders, according to the rules and discipline of war;" — and by the 22d art. 11th sect. of the Articles of War, established for the better government of the troops of the Hon. East India Company, that "all sutlers and retainers to a camp, and all persons whatsoever, serving with forces in the field, though not enlisted soldiers, are to be subject to orders, according to the rules and discipline of war."

With regard to the various crimes and offences which come under the peculiar cognizance of a Court Martial, as the Mutiny Act and Articles of War must be familiar to every officer, it cannot be necessary to enter into any discussion. But an opinion has been expressed in a late work*, dedicated, by permission, to His Royal Highness the Duke of York, which may, on that account, deserve more attention than it seems otherwise to merit. For if the reasoning by which it is supported be examined, it will be found to be both incorrect and inconclusive. In that work Mr.

* Samuel's Historical Account of the British Army and Law Military, p. 195. and following pages.

Samuel observes, that he cannot concur with the learned author of the *Essay on Military Law*, in the conclusion drawn by him, that His Majesty's Regulations have all the binding force of military law, and maintains the contrary opinion by the following arguments.

That His Majesty's Regulations were not one of the known sources whence the law military is derived, mentioned by Lord Loughborough, in Serjeant Grant's case.

That His Majesty's Regulations are not furnished to the courts of law in the same manner that the Articles of War are.

That His Majesty's Regulations are not mentioned in the oath administered to members of Courts Martial.

With regard to the first point, it is obvious, that His Majesty's Regulations were never brought into debate on this occasion, and therefore nothing can be concluded respecting their legal force and effect, from Lord Loughborough's not mentioning them, in a case in which they were not even alluded to.

To proceed, therefore, to the second point, Mr. Samuel argues, with respect to these regulations, evidently on misconception or misinformation.

ation. For he ascribes the same authority to them, as to the orders of a Commander in Chief, or commanding officer of a regiment, and is not aware that the latter are local, particular, and temporary, while the former apply to the army in general, and every officer is expected to be well acquainted with them. His exclamation, therefore, "If orders from these all various branches of command, and touching all the variety of matter to which they may relate, were entitled to the consideration of military law, what volume would be large enough to contain them? what mind sufficiently comprehensive to embrace so heterogeneous a mass of matter?" is entirely misplaced. Because the question does not relate to such orders, but merely to such as are published by His Majesty's order, as the general rules and regulations for the guidance and observance of the whole army. Mr. Samuel, also, seems not to have taken into consideration the 2d art. 24th sect. of the Articles of War, which expressly declares that, "all crimes not capital, and all disorders, and neglects, which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not specified in the said rules and articles, are to be taken cognizance of by a General or Regimental Court Martial, according to the nature and degree of the offence, and to be punished at their discretion." It must be hence evident,

that there can be no breach or infringement of His Majesty's Regulations, but which will come under this very comprehensive article, and consequently, that these regulations have all the effect of military law. It is equally evident, that whether or not judges and courts of justice be obliged to take judicial notice of any articles established by His Majesty, except such as are specified and enumerated in the Articles of War delivered to them, there can be no doubt that they must be taken cognizance of by Courts Martial. But Mr. Samuel's opinion, that "the relevancy or lawfulness of these commands may, in every case, be examinable by the court," is still more extraordinary, for he himself admits, that implicit obedience is the duty of a soldier. He cannot, therefore, be supposed to intend that the members of a Court Martial are, by becoming judges for a time, released from all military subordination; and that they are at liberty to acquit or condemn a prisoner, according to their ideas of the propriety of the regulation or order which the prisoner may be accused of having infringed or disobeyed. Any remarks, however, on this subject must be unnecessary, as every officer will be well aware, that no such question with respect to His Majesty's Regulations could be discussed by a Court Martial. But it is possible that an order of a commanding officer might, in the course of a

trial, appearing to be altogether correct; yet, even in this case, such a circumstance ought not to affect the sentence to be awarded against a prisoner; but merely to be submitted to the proper authority as a sufficient ground for recommending a mitigation or remission of the punishment.

If these remarks on the second point be correct, it will follow that Mr. Samuel's third objection must also fail. For, although His Majesty's Regulations are not expressly mentioned in the oath administered to members of Courts Martial, they are virtually included under the general term Articles of War, as they may be all, in the strictest sense, considered as certain definitions, as far as they extend, of the 2d art. 24th sect. It might, therefore, be unnecessary to pursue the subject further as Mr. Samuel has not analysed this oath in his commentary, which is to be regretted, as it certainly affords sufficient matter for a comment. By this oath the members are bound to duly administer justice according to the Mutiny Act and the Articles of War; and if any doubt shall arise, which is not explained by the said act or articles, according to their consciences, the best of their understanding, and the custom of war in the like cases. It hence becomes a question to determine, what are the particular cases in which this last clause shall have effect. Does it apply

to every part of their proceedings from the first meeting of the members as a court, or merely to their final duty as judges in passing sentence? The words, I think do not admit of their meaning being restricted to the latter sense, as no term can be more general and comprehensive than that of administering justice, which must necessarily comprise every form and every act which is considered indispensable for its due administration. But both the Mutiny Act, and the Articles of War, with the exception of requiring a specific oath to be taken, are perfectly silent with regard to the proceedings of Courts Martial, and consequently these must be entirely regulated by the custom of war in the like cases. Hence, as soon as a court is once formed and the President's warrant is read, even before it is duly sworn, it proceeds to act by determining on challenges, if any are made; and after it is sworn, and before the prisoner is arraigned, it may determine on the relevancy of the charges laid before it, and the competency of its own jurisdiction; yet not one of these acts is authorised either by the Mutiny Act or the Articles of War. I need not mention any other similar instances, as it cannot be disputed that the whole proceedings of Courts Martial, with the exception of the sentence in some cases, are conducted, not in conformity to any provisions contained in the Mutiny Act or rules laid down in the Articles of

War, but, like the common law, according to certain long established forms and usages, which are very aptly termed the custom of war in the like cases. It must therefore follow, that it is perfectly idle in discussing any question of military law, to argue solely on the Mutiny Act and Articles of War, without taking into consideration this custom of war. It is exactly as if one argued on any point, of civil or criminal law, and because the statute book was silent with regard to it, he should therefore conclude that it was not law, although it might have been repeatedly ruled and determined to be such at common law. Were it consequently admitted that His Majesty's Regulations are neither expressly nor virtually included in the first clause of this part of the oath, still if it has been the custom of war for Courts Martial to take cognizance of every breach of these regulations, the latter clause must be considered as sufficiently obligatory on the consciences of the members to govern their decision according to the true meaning and intent of the oath administered to them. It may, also, be added, that the breaches of military discipline which are not specified nor enumerated in any clause of the Mutiny Act, or in any Article of War, are much more numerous and of more frequent occurrence than the crimes and offences which have been distinctly defined in the Mutiny Act and Articles of War. It must be therefore

obvious, that were Courts Martial restricted, in consequence of any imperfection in the oath administered to them, from the trial of such breaches of discipline, the 2d art. 24th sect. of the Articles of War would have no legal force, and that the discipline of an army could never be effectually maintained. But as such a conclusion cannot be admitted without manifest absurdity, it must follow that the true intent and meaning of this oath are, that Courts Martial shall duly administer justice, not only according to the Mutiny Act and Articles of War, but also according to the custom of war in the like cases; and there can be no doubt that this custom of war will in all cases be a full and legal justification of every act that may be done in strict conformity to it by Courts Martial.*

I have entered into a discussion of this passage of Mr. Samuel's work, more fully than it may perhaps appear necessary, because I conceive that the error contained in it may lead to dangerous consequences; and because it has given me an opportunity of making some remarks on a very material point which has hitherto been unaccountably overlooked by writers on military law. Tytler has indeed observed, that "lawyers are in general

*The same reasoning applies, of course, to the Rules and Regulations for the Honourable Company's Army established by the Governments of the different Presidencies.

as utterly ignorant of military law and practice, as the members of Courts Martial are of civil jurisprudence and the forms of the ordinary courts;" and, in another place, the prisoner's counsel will see that it is his part "not to force the discordant and unsuitable axioms and rules of the civil courts upon a military tribunal, but candidly to instruct himself in that law which regulates their procedure, and accommodate himself to their forms and practice."* But he does not explain in any part of his essay the differences which he states to exist between these forms and practice, and the forms and practice of the ordinary courts. On the contrary he distinctly lays it down as a rule, "that in all matters touching the trial of crimes by Courts Martial, wherever the military law is silent, the rules of the common law of the land, to the benefit of which all British subjects are entitled for the protection of life and liberty, must of necessity be resorted to; and every material deviation from these rules, unless warranted by some express enactment of the military code, is, in fact, a punishable offence in the members of the Court Martial, who may be indicted for the same in the King's ordinary courts."† But as no such military code as the one supposed by Tytler exists, or ever did exist, it becomes per-

* Tytler, p. 255.

† *Ibid.* p. 360.

fectly impossible to reconcile these several passages to each other. It is, indeed, singular that so eminent an author should have allowed himself to make use of such unguarded expressions, for the doctrine which he lays down is substantially correct; that is, that the proceedings of Courts Martial differ in some respects from the forms and practice of courts of law; but that whenever the rules of the common law ought to be applied, any deviation from them may subject the members of Courts Martial to punishment. If, however, the preceding remarks be correct, it will follow that the custom of war will justify almost every act of a Court Martial. But there are, at the same time, certain cases wherein this custom could not be pleaded, and which may be all comprised in the following three arguments made use of by Serjeant Marshall in Grant's case. That Grant was not a soldier, and therefore not liable to be tried by martial law, — that evidence was received against him contrary to the rules of the common law, and evidence for him which was admissible was rejected, — that the offence was not an offence cognizable by martial law; — and in the excessiveness or illegality of the punishment awarded. Except for these reasons I am not aware that the proceedings of a Court Martial could ever become the subject of review in a superior court, or that

14 *Authority of General Courts Martial.* [Ch. 1.

the members could become liable either to a civil or criminal prosecution.

The authority of Courts Martial is sometimes extended by executive governments subjecting by proclamation certain districts or countries to the jurisdiction of martial law during the existence of a rebellion. In which case, such offences, as are usually cognizable by the civil courts only, may then be tried by Courts Martial. But in all such cases, particularly in our foreign dominions, a Court Martial ought to be fully assured that the warrant under which they are assembled is strictly legal; and that the prisoners brought before them were actually apprehended in the particular district or country which may have been subjected to martial law, and during the period that the proclamation was actually in force; for any error in these particulars would render the whole of their proceedings illegal.

CHAPTER II.

FORMATION OF GENERAL COURTS MARTIAL AND CHALLENGES.

ALL general Courts Martial are held under His Majesty's authority by virtue of the power vested in him by the 37th clause of the Mutiny Act, which enacts, — " That for bringing offenders against such Articles of War to justice it shall be lawful for His Majesty to erect and constitute Courts Martial, as well as to grant his royal commissions or warrants for convening and authorising others to convene Courts Martial." But they are assembled either by His Majesty's order expressly signified by warrant under the royal sign manual, or by the order of a Commander in Chief to whom the power of convening General Courts Martial have been delegated by His Majesty. They are also assembled in consequence of such Commander in Chief granting, when such power may have been vested in him, a warrant to any officer, not under the rank of field officer, conveying to him the power of convening General Courts Martial. In all cases, however, where this authority is de-

legated, the liberty of approving and confirming the sentences of such Courts Martial as may be held in consequence is subjected to certain restrictions.

It may be here remarked, that after a Court Martial is once assembled, neither His Majesty nor the person by whose authority the court may be held, can in any manner interfere in its proceedings. The President alone, then, becomes vested with the power of assembling and adjourning the court, and of regulating all its proceedings. But in cases of doubt a court may find it necessary to refer to a Commander in Chief for further instructions, and any reply which he may give on such occasions, or any considerations which he may think it necessary to direct to be laid before a court, ought always to be received with every deference and attention. It is not, it is true, absolutely incumbent on the court that they should be guided by them, but they ought to be slow in acting contrary to such sentiments and opinion.

All General Courts Martial must, by the 22d clause of the Mutiny Act, except in a few particular cases, consist of at least thirteen commissioned officers, if assembled for the trial of a commissioned officer; and by the 23d clause no Court Martial, unless it consists of the same number of members, except in a few cases, can sen-

tence any non-commissioned officer or soldier to loss of life or limb, or transportation. By the 5th clause of the Mutiny Act, and the 1st art. of the 12th section of the Articles of War, established for the better government of the Honourable Company's troops, it is enacted, that no General Court Martial in the East Indies shall consist of less than nine commissioned officers. But, although the legislature has thus fixed the smallest number of members of which a General Court Martial can consist, there is no legal objection to its being composed of a greater number. It has consequently become the custom, whenever the service will conveniently admit of it, to appoint more than the legal number, in order to prevent the court's being reduced below it by the sickness or necessary absence of any of its members; and, in all such cases, the additional members vote, and give their opinions in the same manner as the other members.*

The day and place of meeting of a General

* "A Court Martial should be composed of fifteen, or seventeen, or even more members, in order to avoid difficulties which might arise in a long proceeding from death, indisposition, or other causes. It is to be observed, that every member sworn, if present, must give his opinion on the case."—Sir Charles Morgan's Remarks in Advertisement to James's ed. of Tytler, p. xvi.

Court Martial having been previously published in general or division orders, the officers appointed as members, the parties and witnesses attend accordingly. The Judge Advocate then calls over the names of the members, and they arrange themselves to the right and left of the President agreeably to their seniority in the army. The Judge Advocate places himself opposite to the President. The prisoner is now called into court; and although till this period he may have been in close confinement, and even in irons, he must appear there unfettered and without bonds, unless when there is danger of escape or rescue. The orders directing the assembly of the court, the President's and Judge Advocate's warrants are next read, and should the Court be held by authority delegated by a Commander in Chief, it is also customary to read the warrant of the commanding officer so empowered to convene General Courts Martial.

The Judge Advocate now reads over the names of the members to the prisoner, and enquires if he has any exception to any of them sitting on his trial. It is to be observed that he cannot object to the President, as he is appointed by warrant*, nor to the Judge Advocate, as he acts

* "The President of a Court Martial cannot be objected to by challenge in the same manner as the members may be,

on behalf of the Crown. If the prisoner or the Judge Advocate, for challenges may be made either on the part of the King or on that of the prisoner *, have any exceptions, as peremptory challenges are not allowed, they must assign their cause of challenge. The court is then closed, and proceeds to take into consideration the cause assigned, and to decide on its relevancy or validity, and while it is deliberating, the member or members objected to must withdraw.

As every person who can sit upon a General Court Martial must be an officer and a gentleman, it is perfectly unnecessary that I should enter into any discussion of the causes of challenge which may be made to a juror in a court of law.

he being named in the order, or warrant, for the trial. If, therefore, any objection be urged against his appointment, care must be taken to have such objection clear and specific: the Court must then separate, and the objection must be referred for decision to the authority under which his name was inserted in the order or warrant."—Sir Charles Morgan's Remarks in Advertisement to James's ed. of Tytler, p. xvi.

* 4 Blackstone, 352. But this can scarcely happen at a Court Martial, as the Judge Advocate has always an opportunity of apprising the proper authority of any legal objections there may be to an officer being a member of the court, previous to its being assembled; and a private prosecutor ought, if he has any objections, to submit them to the Judge Advocate.

It will, therefore, merely enumerate such as occur at Courts Martial, and are held to be sufficient exceptions to the member objected to.

The expression of an opinion relative to the subject to be investigated.

The having been a member of a court of enquiry on the same subject, which had given an opinion; but, if the court had not given an opinion, the member cannot be objected to.

The having been a member of a General Court Martial, in which the circumstances about to be investigated had been discussed, either principally, collaterally, or incidentally.*

The grounds on which these three causes of challenge have been held to be valid are, that members of a Court Martial should come to a trial as little acquainted as possible with the subject to be tried, and perfectly free from every bias and impression which a previous discussion of its merits, however incidental, could not fail to leave on the human mind.

But there are two other causes of challenge of a much more delicate nature, and the various degrees

* But this of itself does not render an officer incompetent to sit as a member; and he must therefore, be specifically excepted to, should either of the parties object to his sitting.

of which scarcely admit of definition. I mean suspicion of prejudice and malice. It is in assigning these as causes, that officers must always labour under the greatest difficulty, and must, when obliged to do so, most severely experience the disadvantage of being denied the benefit of peremptory challenges. There are in fact, no words, no expressions, which could be used amongst officers, to convey such a suspicion that might not lead to future dislike or even enmity. It becomes, also, for the court a point of no little delicacy to call for such an explanation of the supposed prejudice or malice as might enable them to judge how far the exception was well founded. Courts Martial, therefore, when such a cause is hinted prefer rather to deviate from the strict line of their duty than to enter into any discussion which might be productive of disagreeable consequences. They accordingly refrain from all enquiry into the particular circumstances whence this suspicion may have arisen, and permit the member challenged to withdraw. But should the Court deem it expedient, on the public service render it necessary, that these circumstances should be taken into deliberation, the decision on their relevancy or validity must depend entirely on the good sense, and sound judgment, of the members of the court. Nor is it possible to lay down any general rules or principles by which such a decision ought to

be guided, as the different degrees and shades of prejudice and malice are too various to admit of being reduced under any particular enumeration. It may, however, be observed, that if the reasons assigned appear to have the slightest tendency to bias or influence the opinion of the member objected to, the challenge ought to be considered as valid. *

If the challenges made be admitted to be valid, the members objected to withdraw, and their places are either supplied by other officers, or if the court still consist of a legal number of members, it may immediately proceed with the trial. The Judge Advocate and prisoner may, in case of any new members being admitted, challenge them also. When all objections are disposed of, the Judge Advocate proceeds to swear in the court, by first administering the oath prescribed in the Articles of War to the President singly, and then to the

* In 4 Comm. 353. Blackstone justly observes, that "upon challenges for cause shown, if the reason assigned prove insufficient to set aside the juror, perhaps the bare questioning his indifference may provoke a resentment." Ought a member, then, of a Court Martial, challenged for cause shown, if the objection be overruled, to resume his seat? In general, the member requests permission to withdraw, and the court comply with this request. But if the court can grant such permission, what necessity is there for their previously calling upon the party objecting to state his cause of challenge, unless the member excepted to wishes it?

members collectively on his right and left; after which the President administers the prescribed oath to the Judge Advocate.

The long agitated question, whether or not it be necessary that the members of a Court Martial, before whom two or more trials are brought, ought to be re-sworn at the commencement of each new trial, has been decided by the following general order of His Royal Highness the Prince Regent: — “In all cases in which more prisoners than one (being arraigned for different crimes) shall be tried by the same General Court Martial, the Court shall be re-sworn at the commencement of each trial, and the proceedings shall be in every respect made up separately and signed, as if such prisoner had been tried by a distinct Court Martial.” *

The 31st clause of the Annual Mutiny Act enacts as follows: “That when and as often as there may be occasion, it shall and may be lawful for officers of His Majesty’s land forces, and of the forces of the United Company of Merchants of England trading to the East Indies, to sit in conjunction at Courts Martial, and to proceed in the trial of any officer or soldier, in like manner, to all intents and purposes, as if such Courts Martial were composed of officers of His Majesty’s

* General Regulations for His Majesty’s Army, p. 126.

land forces, or of the said United Company only; with this distinction, that upon the trial of any officer or soldier of His Majesty's land forces, regard shall be had to the regulations and provisions made by or in pursuance of this act; and the oaths administered to the several members of the Court Martial shall be in the terms by this act prescribed: and upon the trial of any officer in the service of the said United Company, regard shall be had to the regulations and provisions made by or in pursuance of an act passed in the twenty-seventh year of the reign of His Majesty George the Second, intituled, &c. and the oaths administered to the several members of the Court Martial shall be in the terms prescribed by the same act."

If, after a Court Martial has been duly constituted, and the trial has been commenced, the President should be unable, from sickness or other unavoidable cause, to attend, and the court should, notwithstanding his absence, still consist of a legal number of members, it is competent for the authority under which the court is held to issue a warrant to the next senior member, constituting him President. In which case, no alteration being requisite in the former proceedings, the trial shall be continued in the same manner as if no interruption had taken place. The Judge Advocate also

may, if necessary, be relieved at any period of the trial.

But if the court should, from any cause, be reduced to a less number than the legal number of members, the trial cannot, in strict conformity to the practice of courts of law, be continued, nor can any sentence be given. This, however, is not to operate as an acquittal of the prisoner; and he may, therefore, be remanded to confinement, and another court may be assembled for his trial. But, in consequence of all the proceedings of a Court Martial being carefully reduced to writing, and of the inconvenience and detriment which might often arise to the public service, Courts Martial are not obliged to adhere in this case to the strict principles of legal procedure; and it is, therefore, their practice, that new members may be added, if such persons hear, or be well informed of the evidence given before their attendance. It is therefore sufficient, in any case where a new member or new members are added, that the proceedings be read over to them, and that each witness should be in court during the reading of his evidence, in order that the new members may be satisfied that it is his evidence, and that they may have an opportunity of putting any questions to him which they think necessary.

In case a member should, during the trial, be

prevented from attending the court for any period, while proceedings were going on, he cannot resume his seat; if, however, no evidence was given during his absence, he might, if absolutely necessary, be permitted to resume his seat.*

* It happened at a General Court Martial that a member was prevented from attending on the day that the prisoner read his written defence to the Court; and that before the Court again assembled, another of the members was taken ill, which circumstance reduced the Court below the legal number of members; in this case the Court decided, that as no evidence had been given on the day on which the former member was absent, he might resume his seat.

CHAP. III.

PRELIMINARIES TO TRIAL AND CHARGES.

WHEN the Court is duly constituted by the prescribed oaths having been administered, the Judge Advocate reads the charges in an audible voice. On hearing which, should any doubts arise, whether originating with the members of the Court or with the parties on the trial, with regard either to the competency of the Court's jurisdiction or the relevancy of the charges, these doubts must be now discussed. For should there appear any objection to the legality of the trial, which is self-evident and insurmountable, such as that the prisoner is not subject to military law, or that the crime charged is a civil offence, the Court ought to suspend their proceedings, and to submit the objection to the consideration of the authority by whom they may have been assembled. It is also held, that it is an undoubted right, and even the duty of every Court Martial, to reject any illegal or erroneous charge.*

Horse Guards, 13th Dec. 1815.

* "I am further to acquaint you, that the Prince Regent considered that the latter part of the charge ought not to

They are nevertheless bound to record their proceedings and resolution upon it. If, likewise, the charge or charges be drawn up in a loose and indefinite manner, although the generality of a charge may not be absolutely repugnant to military law, still the prisoner may, previous to pleading on his arraignment, call upon the prosecutor to specify the particular facts of which he intends to accuse him; and as this requisition is founded in material justice, no Court Martial can legally refuse it.* Such is the power and the strict duty of Courts Martial before entering on any trial; but it is seldom that they think it necessary to act accordingly, and the consequence is, that charges are almost always submitted to investigation with all their imperfections on their head.

It is, also, at this stage of the proceedings, that the prosecutor or prisoner should state their reasons to the Court in case they wish the trial to

have been the subject of investigation before the Court, as well from the vagueness of its wording, as from its forming a most serious and distinct subject of accusation in itself; but His Royal Highness at the same time remarked, that although the conduct of the prosecutor and the Court appear to have been irregular, the one in preferring an accusation so indirectly framed, and the other in receiving it," &c.

James's Case Book of Courts Martial, p. 575,

* Tytler, p. 217.

be delayed. For, according to the practice of courts of law, all motions for putting off the trial must be made previous to the swearing in of the jury and entering into the trial. At Courts Martial, however, it is first necessary to administer the oath to the Members in order to invest them with the character of judges, and it seems also requisite that they should be previously acquainted with the nature of the subject which is to be investigated, in order to enable them to appreciate correctly the reasons for staying the proceedings which may be assigned. But every such motion ought, in strict regularity, to be made before the prisoner is arraigned and the prosecution is entered into. Yet there are various instances of Courts Martial having adjourned after the trial had commenced, on application from the prosecutor, in consequence of the absence of a material witness. Such an adjournment may, in many cases, conduce to the proper investigation of the charge, and as it is the practice of Courts Martial to adjourn daily, whether the trial be finished or not, there would seem to be no impropriety in the Court, in sound discretion, determining whether or not, on any particular occasion, such a deviation from the strict course of proceeding ought to take place.

The postponing of a trial is not a matter of right, either when the application is made on the part of the prisoner or on the part of the crown;

for, in either case, the Court, in its discretion, may grant or refuse the motion. It is necessary, therefore, on all such applications, that the party applying shall satisfy the Court that the persons absent are material witnesses, that their non-attendance has not proceeded from any omission or neglect on his part, and that their attendance may be reasonably expected on the day specified in the application. It will, however, be obvious that an essential difference exists between the postponing a trial at courts of law and at Courts Martial. In the first case a trial is called on when a motion is made to put off the trial, and after a speech or two, the motion is granted or refused without any inconvenience to the business of the Court or to the judge and jurors. But a Court Martial cannot be assembled without withdrawing its members from other duty, and perhaps bringing them from a distance, and every delay must consequently be, in some degree, detrimental to the public service. A Court Martial ought, therefore, to be particularly strict in requiring sufficient and satisfactory reasons for every application to postpone a trial; and although they may act with indulgence to a prisoner, they ought in no case to consent to such an application from the prosecutor, unless he proves that circumstances unavoidable on his part prevent his entering into or proceeding with the prosecution; and that, as

he has every reasonable expectation of substantiating the charge, the ends of justice would not be attained unless a short adjournment was allowed, in order to admit of the arrival of the requisite witness.

The best description of a military charge which I have met with, is in the following words of the Judge Advocate General on Colonel Quentin's trial. "It is well known by every body, that in the case of charges brought before a Court Martial, they are not bound to the technical formalities which prevail in other courts of law; but there is this essential principle in every charge before any court that can exist in the civilized world, that the charge should be sufficiently specific to enable the person accused to know what he is to answer, and to enable the Court to know what they are called to enquire into." * Charges, therefore, must design and mark out the prisoner by his name, surname, rank, and the regiment or department to which he belongs. The fact or facts ought also to be distinctly specified, or alleged in such a manner, that neither the prisoner nor the Court can have any difficulty in knowing what is the precise object of the trial. The same minuteness and precision ought to be observed in specifying the time and place when and where the facts charged were committed, for such specification may be essentially

* Colonel Quentin's Trial, p. 81.

necessary to the prisoner's defence. But if a prosecutor be doubtful with respect to the time or place, he may charge that the fact was committed at or near such a place and on or about such a date. This, however, ought never to be permitted if it can possibly be avoided without a sacrifice of justice, as it may deprive the prisoner of many advantages on his defence.

It is not necessary that it should be specified in the charge that the offence alleged has been committed in breach of any particular article of war. But if the prosecutor wishes to bring it under any particular article, in order that the prisoner may suffer the penalty therein prescribed, he must in his charge make use of the same words to describe the offence which are employed in that particular article.

It ought, also, to be remarked that, in framing charges, the act or acts only to which criminality is attributed ought to be stated, and in as concise a manner as can be rendered consistent with the requisite specification. Private prosecutors, however, too frequently either from over anxiety or an error of judgement, think it necessary to include in their charges a variety and complication of circumstances which are in themselves either trivial or devoid of all criminality. But they should recollect that they are bound to prove every part of

the accusation which they may have professed, and that any failure of proof will always tend considerably to invalidate the whole of the prosecution. The more diffuse, therefore, that they are in wording their charges the more liable will they be to find that many of the circumstances specified are either not supported by evidence, or represented by the witnesses in such a manner as to exclude every inference of guilt. Distinctness and brevity are, consequently, the principal requisites in a charge; and whenever these are materially deficient, if a Court Martial would at once point out to a prosecutor the particular parts to which they attach neither criminality nor importance, and inform him that it is unnecessary to adduce any evidence in their support, many a tedious and uselessly prolonged investigation would be avoided.

It is the custom of Courts Martial that the charges should be read over to each witness immediately after he is sworn, and before he is examined. In all cases, therefore, when an officer or soldier is accused of having made use of disrespectful or insulting expressions, the words themselves ought not to be set forth in the charge; because such a specification would be equivalent to suggesting the whole of his evidence to each of the witnesses, and would consequently deprive the

prisoner of every advantage which he might have derived from a contradiction or inconsistency in their testimony. The words, also, are often so very indelicate that it is highly improper that they should be read over and over again in a public Court. But as the first of these objections does not apply to letters which are themselves the best evidence of their own contents, it is requisite that the particular passage or passages on which the accusation is founded, should be specified in the charge. If, however, the whole letter is alleged to be disrespectful, it is not necessary that its contents should be stated.

After a prisoner has been arraigned on and pleaded over to specific charges, it is perfectly irregular to admit of any additional charge being preferred against him, even although he may not have come on his defence. This irregularity has sometimes taken place at Courts Martial when the prosecutor has found that he had precluded himself from proving some fact which he intended by the manner in which he had worded the original charges, or from some fact transpiring during the trial with which the prosecutor could not be reasonably supposed to have been previously acquainted, or from some improper conduct of the prisoner during the trial. In such cases Courts Martial have permitted the prosecutor to prefer an additional charge, under the

impression that they were acting favorably towards the prisoner, as it saved him the inconvenience of two trials, and prevented his continuing in arrest or confinement. But as this mode of proceeding is directly contrary to the practice of other Courts, and to the well known rule of law, that no innovation shall take place pending the original issue, it must be considered as highly incorrect and irregular.

It is customary to furnish a prisoner with a copy of the charges preferred against him when he is placed in arrest or confinement, or at least a reasonable time before his trial; and after these charges have been approved of by the proper authority, it is not competent for any person to make, without the sanction of that authority, any alteration whatever in such charge. But the not furnishing a prisoner with a copy of the charge, or any difference which may exist between the charge on which he is arraigned and the copy furnished him, cannot be pleaded by him in bar of trial. These circumstances can be only urged by the prisoner as sufficient grounds for requesting from the Court a longer time for the preparation of his defence. For, as it will be immediately observed, it is of no importance whether he clearly understands the charge on arraignment or not, as it will always be presumed that he pleads not guilty.

“It is not to be supposed that a charge drawn up by those, who may prefer it, is to go of course in that state to trial: but it may be framed and altered in such way as the officer, who is to order the trial, may think best, both in regard to the substance as in other respects. And it is a mistaken idea which prevails that an officer can demand a Court Martial either upon himself or others. It is to be observed that no such right exists, the granting of a trial rests solely in the discretion of the person to whom the authority of ordering Courts Martial may be delegated.”*

There is nothing more misunderstood by officers than that part of the 15th clause of the annual mutiny act which declares, that no officer or soldier being acquitted or convicted of any offence shall be liable to be tried a second time for the same offence. For the true meaning and intent of these words apply to such officers and soldiers only who have been legally tried and have been legally acquitted or convicted. If, therefore, any illegality take place in the constitution of the Court, or in the course of the proceedings, or in passing sentence, such illegality vitiates the whole proceedings, and the prisoner must in consequence be discharged. But such proceedings are not to

* Sir Charles Morgan's Remarks in Advertisement to James's ed. of Tytler, p. xiv.

be considered as a trial of the prisoner, not having been legally conducted. A new charge may therefore be preferred against the prisoner and a new Court assembled to investigate it, and in this case the prisoner cannot plead a former trial or acquittal or conviction in bar of his impending trial. *

By the 158th clause of the Annual Mutiny Act, it is enacted "that no person shall be liable

* It is a little surprising that M'Arthur, vol. ii. p. 159. should have made the following remark, "In this place it may be proper to remark, that if a prisoner be tried for a crime said to have been committed on a particular day of the month, and that in the course of the trial, it is proved to have happened on a day different to what the indictment sets forth, it is incumbent on the Court Martial to acquit him, and he is not liable to be tried a second time for the same offence." For Blackstone, vol. iv. p. 306, observes with regard to an indictment, — "The time and place are also to be ascertained by naming the day and township in which the fact was committed; though a mistake in this point is in general not held to be material, provided the time be laid previous to the finding of the indictment and the place to be within the jurisdiction of the Court." The first part, therefore, of M'Arthur's remark is incorrect; and as it must be evident that an offence committed on the 14th cannot be the same offence as that which was committed on the 15th day of the month, the latter part must be equally incorrect, for Blackstone observes, vol. iv. p. 336. — "That the pleas [in bar of trial] of *autrefois acquit* and *autrefois convict*, or a former acquittal or conviction, must be on a prosecution for the same identical act and crime."

to be tried and punished for any offence against any of the said acts or articles of war, which shall appear to have been committed more than three years before the issuing of the commission or warrant for such trial; unless the person accused, by reason of his having absented himself, or of some other manifest impediment, shall not have been amenable to justice within that period; in which case such person shall be liable to be tried at any time not exceeding two years after the impediment shall have ceased." But a Court of Inquiry may be held after the lapse of any period.

CHAPTER IV.

ARRAIGNMENT AND FORM OF TRIAL.

IF no doubts or objections arise on the perusal of the charges, or as soon as any which may have arisen are disposed of, the Judge Advocate asks prisoner by name if he be guilty or not guilty.

Thus arraigned, the prisoner may stand mute, that is, refuse to answer or answer foreign to the purpose, or he may confess the fact of which he is accused ; in both of which cases, according to the strict forms of Criminal Law, nothing remains for the Court but to pronounce judgment. But Courts Martial have adopted a more lenient mode of proceeding and it is their practice, that whatever be the prisoner's reply, whether guilty or not guilty, or should he stand mute, and it is determined by the Court to be from malice or obstinacy, the witnesses for the prosecution are brought into Court, the oath administered to them, and their depositions taken in the presence of the prisoner to questions put either by the Court, Judge Advocate, or prisoner. *

* " It has not been usual with Courts Martial held at the Horse Guards to require from a prisoner an express plea of

The prisoner, also, on being arraigned, may offer certain pleas in bar of trial, such as the incompetence of the Court's jurisdiction, the irrelevancy of the charge, or a former trial for the same offence, and on those pleas the Court must first decide; and if the Court, after deliberation, determine that the plea advanced by the prisoner is valid he must be immediately discharged; but if it be rejected he is still at liberty to plead not guilty. The remark of Tytler that it cannot be doubted that a promise or assurance of mercy given on the condition of becoming evidence against an accomplice would be an effectual plea in bar of trial, is applicable only to the Scottish Law. For, according to the law of England, by which alone Courts Martial must be guided, it is laid down, that the "admission to be a witness amounts to a promise of a recommendation to mercy upon condition that the accomplice makes a full and fair disclosure of all the circumstances of the crime for which the other prisoners

guilty or not guilty. The latter as being most for the advantage of the prisoner is presumed; and the prosecutor immediately after the arraignment of the prisoner is called upon to produce his proofs in support of the charge." "If the prisoner should plead guilty, evidence must be heard of the fact or facts, or how can the crown, or the officer authorized to confirm the sentence, have any ground for extending mercy." Ibid. pp. XI., XII., XXIII.

are tried, and in which he has been concerned in concert with them. Upon failure on his part with this condition he forfeits all claim to protection.”* Such a conditional or implied promise of mercy cannot, therefore, be pleaded, and nothing but a full pardon duly verified can be admitted by a Court Martial as a sufficient plea in bar of trial.

There is, also, another plea in bar of trial which may sometimes occur at a Court Martial, but which can be of little advantage to the prisoner, as it will appear from the following passage of Blackstone’s Commentaries. “A plea in abatement is principally for a misnomer, a wrong name, or a false addition to the prisoner; as if James Allen, Gentleman, is indicted by the name of John Allen, Esquire, he may plead that he has the name of James, and not of John, and that he is a Gentleman and not an Esquire, and if either fact be found by a

* 4 Blackstone, 331, *note*. Mr. Christian adds—“Upon a trial some years ago at York, before Mr. J. Buller, the accomplice, who was admitted a witness, denied in his evidence all that he had before confessed, upon which the prisoner was acquitted; but the judge directed an indictment to be preferred against this accomplice for the same crime, and upon his previous confession and other circumstances he was convicted and executed. And if the jury were satisfied with his guilt, there can be no question with regard both to the law and justice of the case.”

jury, then the indictment shall be abated." "But in the end there is little advantage accruing to the prisoner by means of these dilatory pleas; because, if the exception be allowed, a new bill of indictment may be framed, according to what the prisoner in his plea avers to be his true name and addition. For, it is a rule on all pleas in abatement, that he, who takes advantage of a flaw *, must at the same time show how it may be amended." If, therefore, any mistakes occur in a charge with respect to the name of the prisoner, it is competent for the Court Martial to permit the prosecutor previous to arraignment to correct the charge and to insert in it what the prisoner avers or proves to be his true name.

But in the usual administration of military law it is not likely that these circumstances can often occur; and it may therefore be concluded that a prisoner will, in almost every instance, plead not guilty. It must be remarked, that a prisoner on pleading over to the charges can only reply guilty or not guilty. He cannot enter at this stage of the trial into any explanation or exculpation of his conduct, but must confine himself to the mere confession of his guilt or the simple and unqualified denial of the offence laid to his charge. Every cir-

* 4 Blackstone pp. 334. 335.

cumstance which may tend to his justification must be reserved until he is put on his defence; and then he is at liberty to bring forward and prove by evidence every fact which may, in his opinion, conduce either to extenuate or entirely refute the charge preferred against him. Officers have sometimes hesitated in pleading not guilty when they were conscious that they had committed the fact or facts charged. But they ought to recollect that it is not the simple fact which they deny by so pleading, but the criminality ascribed to it by the prosecutor, and perhaps other circumstances which he may have connected with it, and of which they are really innocent. Even a military charge, which might be rendered so simple, is in general of a complicated nature, and, therefore, although a Prisoner may be aware that the principal facts stated in it will be proved against him, still he may have it in his power to refute several of the other allegations in it, and thus to discredit in some degree the whole of the prosecutor's evidence. Many alleviating circumstances might also appear in the course of a trial which might tend to the extenuation, if not the exculpation, of his conduct, and thus conduce to to mitigate the final sentence, or at least to lead the Court to recommend him to mercy. Of such advantages an officer may certainly avail himself, without being under any apprehension that his

doing so subjects his honour to the slightest imputation. *

When the prisoner has pleaded over to the charge, the trial proceeds in the following manner.

The ordinary course of a trial is this : the person managing the prosecution states the charge, then calls his witnesses who are to prove the facts which constitute the charge, and proves and reads any written evidence which he may have to the same purpose. The prisoner has a right to cross-examine every witness of the prosecutor immediately after he has given his testimony; and the

* In a book which is probably put into the hands of many a young officer, Paley's *Moral Philosophy*, a prisoner's pleading not guilty is enumerated as one of the instances "that there are falsehoods which are not lies." A treatise on morality which diminishes and, in fact, takes away all guilt from falsehood, is rather a singular work : but if the above reasoning be correct, it must be admitted that in no sense of the word can falsehood be ascribed to a prisoner who pleads not guilty to a military charge framed as military charges almost always are. In many cases, also, this plea of a prisoner is fully justified by the Court's acquitting him of all the aggravating circumstances and epithets which the prosecutor may have attributed to the simple fact which was actually committed. Did a military charge, indeed, boast of the consciousness and simplicity of an ancient Athenian criminal accusation, I know not any casuistry which could excuse an officer's pleading not guilty if he were conscious that he was really guilty.

prosecutor has a right to examine him in reply to all such matters as have been examined into by the prisoner. It is a general rule in every stage of the cause, that he who calls a witness (if that witness is cross-examined) has a right to examine into the same matter. If the prisoner has any objection to the competency of a witness (as that he is interested, has been convicted of perjury or any other infamous crime,) he must make his objection before the witness is examined; but if the objection be only to his credibility, or if he can show why full credit ought not to be given to him, (as he is a general bad character, in enmity with the prisoner, &c.) this not being a bar to his examination must be reserved by the prisoner till he makes his defence.

The prosecutor, before the prisoner makes his defence, must produce all the evidence he has to support the accusation, that the prisoner may not disclose the defence, till he knows the whole he has to answer to,

The prosecutor having finished his evidence, the prisoner states to the Court his defence, calls and examines his witnesses, and proves and reads his written testimony. The prosecutor may cross-examine, and the prisoner re-examine as in the case of the prosecutor's evidence.

If the prisoner confines his defence to the simple

contradiction of the evidence brought by the prosecutor, here all the evidence is finally closed, unless the prosecutor calls witnesses to impeach the character or testimony of those of the prisoner. The prosecutor can then observe upon the whole evidence, but can produce none. The Court are then to consider of their judgment.

But if the prisoner in his defence introduces any new matter, or any evidence not examined by the prosecutor, which is frequently done, when the prisoner either cannot contradict the evidence against him, or does not think he has so fully done it, as to rely merely on the contradiction, and has other collateral matter to give in evidence, from which his innocency is to be presumed, as the attempt to prove an alibi, or good character, or to discredit the witnesses of the prosecutor, then the prosecutor is allowed to examine witnesses on the new matter. *

* Minutes of Council in Bengal published for the information of the army, 8th February 1781, and stated to have been sanctioned by the highest legal authority.

CHAP. V.

PROSECUTION.

As the King is the prosecutor of all military offences, it is the duty of the Judge Advocate, as expressed in his warrant, to prosecute in His Majesty's name all persons who may be brought before a General Court Martial. But, in most cases, it seems now to be the established practice, that the person, if an officer, who is either from his situation the best acquainted with the circumstances to be investigated, or who has individually suffered an aggression or injury from the prisoner to be tried, shall sustain in court, jointly with the Judge Advocate, the character of prosecutor; and as such shall conduct of himself the whole of the prosecution. But if the person bringing forward an accusation against any person in the army is not himself an officer, he cannot appear in court as the prosecutor, but merely as an informant; and in that case the Judge Advocate conducts the prosecution. In some cases, also, the Judge Advocate finds it necessary, for the better conducting of the trial, to request that the person, from whom he has received his principal information respecting

the charges under investigation, may, after having given his evidence, be permitted to remain in court. This request is always complied with, and the person so remaining in court is also named an informant. But it is to be remarked, that an informant is merely allowed to be present in court, for the purposes of material justice, as an assistant to the Judge Advocate, and that he cannot of himself propose any question, or make any observations whatever. Should any thing occur to him during the proceedings he must state it to the Judge Advocate, who, if he thinks the remarks are just, will avail himself of the suggestions of the informant,

It is to be regretted that the frequency of charges founded on insufficient grounds, and sometimes arising from private and interested motives, and not from a zeal for the public service, should have occasioned a prejudice against appearing in the character of a prosecutor. Such a task is always painful to the feelings of every officer, and it is hard that the discharge of so disagreeable a duty, but which is indispensably necessary for the very existence of an army, should be rendered more irksome by the unmerited odium too often cast on a prosecutor. But the prejudice ought not to be entirely reprobated. For, although in some instances it may prevent an officer from

bringing an offender to justice, yet, in most cases, it will only induce him to pause before he prefers a charge against a brother-officer or soldier, and to reflect, that he should not be influenced by any sudden gust of impatience or dislike, but that he should calmly deliberate, and clearly ascertain the truth of every fact, before he involves himself in a prosecution on which his own character must, in some measure, depend.

After the prisoner has been arraigned, the prosecutor may, if he wish it, open the charge either verbally or by reading a written address to the Court. * “For (as it was observed by the late Judge-Advocate-General at Colonel Quentin’s trial) though there is no objection to the prosecutor being a witness, I hold it to be perfectly informal that the prosecutor should be sworn before he makes his speech; he ought to make that speech not under that sanction.” † Nor is it necessary that the prosecutor should be sworn at all, unless he wishes to give his own evidence in

* “If the prosecutor has any opening of his case to submit to the Court, he should deliver that before he is sworn; after which he is to be sworn, and to give his testimony. This, however, is not to be understood as making it a necessary qualification for a prosecutor that he should be a witness.”

Sir C. Morgan’s Remarks in advertisement to James’s ed. of Tytler, p. xvi.

† P. 55.

support of the charges, which he may legally do, or he is called upon as a witness by either the Court or the prisoner. * Whenever a prosecutor, after having read a written address, offers his own evidence, it is most regular that the Judge Advocate should put to him the necessary questions. But on Lieut.-General Sir John Murray's trial, the Judge-Advocate observed, "I should think Admiral Hallowell may be sworn to the truth of all such facts contained in that statement as are within his own knowledge, and subject to such questions as may be put by Sir John Murray." In which opinion the Court concurred. At the same time the Judge-Advocate put this question to Sir J. Murray; "As the more strict course of proceeding would be to put the questions upon this to Admiral Hallowell, I would ask you, Sir John Murray, whether you are satisfied with this mode of proceeding, or whether I shall pursue the more formal mode?" To which Sir John replied, "Perfectly so; I am perfectly satisfied."† This opening address ought to be confined solely to such remarks as tend to elucidate either the origin or the nature of the charges, or to explain the manner in which they are to be substantiated;

* At Colonel Quentin's trial the prosecutor was sworn on the 5th day.

† P. 84.

and it ought never to be made the vehicle of invective against the prisoner, nor the means of exciting a prejudice against him in the minds of the Court.

The proper conducting of a prosecution must depend entirely on the ability of the prosecutor, and no general rules can well be laid down which would assist him in the performance of this duty. It may, however, be observed, that he must confine himself strictly to the charge and that he is not at liberty to give in evidence, by way of aggravating the prisoner's guilt, any facts which have not been specifically alleged in the charge. For were such evidence admissible, persons might be tried for offences of which they were not legally accused, and against which they were not legally called upon to defend themselves; nor could a prisoner be ever aware of the evidence which he would have to controvert, nor of that which it might be necessary for him to adduce in his own justification. But in applying this rule of law, Courts Martial have sometimes carried it to an extreme, and have refused to admit evidence of any circumstances which occurred either antecedent to or subsequent to the very date of the fact charged. It must, however, be evident that in every case where the criminality of the action consists principally, if not entirely, in the intention, and where, from a defect of direct proof, recourse must be had to circum-

stantial evidence, the charge could not be substantiated if the prosecutor were not permitted to produce in evidence many circumstances not specifically alleged in the charge. The real meaning of the rule, therefore, is, that although such circumstances as clearly tend to convict a prisoner of the specific charge preferred against him are admissible, still no matter, not put in issue by the charge, can be received, which would implicate the prisoner in a new and distinct offence, or in a greater degree or extent of guilt than appears in the charge on which he has been arraigned.

Nor can the prosecutor adduce any evidence with respect to the prisoner's character, except so far as it is put in issue by the charge.

But the greatest difficulty under which private prosecutors in general labour, proceeds from their manner of wording the charges which they prefer. In these they almost always blend their own inferences and conclusions with the real facts of the case; and they are consequently not a little surprised, when they produce their witnesses before a Court Martial, to find that their proof becomes very defective. They are hence led, in order to supply this unexpected defect, to put questions of opinion, and if these be checked by the Court, to examine into a number of trifling and unimportant particulars, in the hope that the Court may draw

the same conclusions from them that they themselves did. In framing a charge, therefore, a prosecutor ought to ascertain clearly what are the exact facts which he may have it in his power to substantiate, and these he ought to set forth unencumbered with any aggravating or adventitious circumstances.. Whatever degree of criminality he may attribute to these facts, or whatever other inference he may draw from them, ought to be stated either in the heading or the conclusion of the charge. Having thus, in the first instance, separated matter of fact from matter of opinion, and corrected his own impressions by the information of others, he will experience no difficulty on the trial, in conducting the prosecution; nor will he suffer the disappointment of finding that his charges have been but imperfectly supported by his witnesses.

CHAP. VI.

DEFENCE.

AFTER the prosecution is closed, the prisoner enters on his defence; the most regular mode of conducting which, as it conforms to the practice of courts of law, and as it has been, I believe, observed at all Courts Martial conducted by the Judge-Advocate-General, is that the prisoner should first address the Court and then produce his evidence. But a contrary custom prevails in India (and elsewhere according to Tytler), for there the evidence in exculpation is in general concluded previous to the prisoner's addressing the Court. This last method, it must be obvious, is most advantageous to the prisoner, as it enables him to be fully aware of the exact nature of the evidence given on his defence; and thus prevents his hazarding in his address any remark or assertion on a supposition, as he must otherwise have done, that it would be supported by his witnesses. It is scarcely possible that an officer, who appears for the first time a prisoner before a Court Martial, and who has perhaps never before attended

any trial, can foresee what will be the probable result of the examination of any witness whom he may produce. This must depend entirely on the knowledge of the circumstances of the case which the witness may possess, and on the acuteness and ingenuity of the cross-examination to which he may be subjected. But prisoners seldom or never advert to these considerations, and if a person can depose to any circumstance in their favor, however trifling, they immediately call upon him as a witness; without recollecting that, as soon as he enters the Court and is duly sworn, he becomes bound to declare the whole truth of what he actually knows, however unfavorable it may be to the party who produces him. As, therefore, the chance is that the evidence on the defence will, in most cases, prove much weaker and much less to the point than the prisoner expects, it is clear that if he addresses the Court previous to its being received, he may be led into very material mistakes, which may tend to invalidate the whole of his vindication. Even in a court of law how much more conclusive it would be, if the counsel for the prisoner, instead of saying that such a witness would be contradicted by another whom he intended to produce, had it in his power to contrast in the course of his speech the actual contradictions of the two witnesses; and how often has the evidence on the defence proved di-

rectly the reverse of what the counsel had stated. But that a prisoner, when defending all that is dear to him, should be subjected to any disadvantages for the sake of a mere form, cannot be considered consistent either with equity or justice; and a Court Martial, therefore, as it is not obliged to proceed according to the forms of courts of law, ought always to allow the prisoner to conduct his defence in the manner which he may request.

Many officers entertain an opinion that a Court Martial cannot interfere in any manner in a prisoner's defence, and that he is at liberty to conduct it in whatever way he chooses. But this opinion is entirely erroneous, and seems to have originated from no distinction being made between the prisoner's address to the Court (which is usually called his defence), and the evidence which he adduces in justification of his conduct. In the first, it would seem that a court of law seldom or never interferes, but the latter is completely subject to the control of the Court. It is the Court alone who are the judges what evidence shall be admitted or rejected, and neither the prosecutor nor the prisoner can insist on the admission or rejection of any contrary to their opinion, far less can they protest against such a decision. But the prosecutor or prisoner may state their reasons

for offering, and also their objections against the receiving, of any particular evidence, and, if the Court are of a contrary opinion, may request that these reasons or objections may be recorded on the proceedings, and with this request the Court in general complies. In exercising this right of control with regard to the evidence offered by the prosecutor, Courts Martial have never felt the slightest hesitation. But from a mistaken lenity they have so often forbore from exercising it in the prisoner's case, that it has become a subject of dispute whether or not they have the right of objecting to any evidence which the prisoner may think proper to produce. If, however, they can do so in the one instance, they certainly have the same power in the other, as the law makes no distinction between the evidence offered by the prosecutor or prisoner; and members of Courts Martial in particular are sworn to administer justice without partiality, favor, or affection. I am, at the same time, aware that Courts Martial are sometimes averse to passing a decision on any question proposed by the prisoner, lest they might, in doing so, in some degree, betray their final opinion. But this notion seems to be quite groundless; for it can never be necessary that the Court should use a stronger formula than this, — that the question was neither applicable to the charge nor beneficial to the prisoner's defence. In passing such

a decision, no opinion is given or implied respecting what may be the final judgment of the Court; and yet it embraces every question that could possibly arise. On the effect, indeed, of extenuatory evidence much difference of opinion must exist; but although a Court Martial may be therefore unwilling to reject any which a prisoner wishes to adduce, they ought still, before they admit it, to be fully satisfied from his opening of it that it will really have the tendency which he expects.

But although a court of law rarely interferes with the prisoner's address to the Court, still no prisoner is ever allowed to introduce into it the names of persons who are not concerned in the trial; and there is also a certain decorum which ought always to be observed in its style and expression. Officers, however, and not young officers only, are too often led from resentment or from a desire of making a very eloquent and impressive appeal to the feelings of the Court, to forget what the real object of a defence is, and to indulge themselves in a variety of topics perfectly foreign to the subject, and not unfrequently in ungenerous and personal reflections on the witnesses, and irrelevant recriminations on the prosecutor. But the writer of these pages can assure them, from a pretty long experience, that such defences, instead of proving beneficial to the pri-

soner, always tend to leave an impression unfavourable to him in the minds of the Court, and that there is more than one instance of the King having struck an officer's name out of the list of the army, solely on account of the intemperance of his defence.

To lay down any rules for the proper conducting of a defence is difficult. But it may be observed that all offences divide themselves into two distinct parts, — the fact and the intention. It is seldom that an officer is brought to trial who is perfectly innocent of the accusation preferred against him. Should this, however, happen, a prisoner's task is easy, and, in this case particularly, he ought to confine his defence to the simple refutation of the charge, and to the best proof of his own innocence. For, if he then enters into any irrelevant matter or any recrimination on his prosecutor, he may be certain that, so far from strengthening, he materially weakens his own vindication. But a fact may, by the manner in which it is represented, appear extremely improper or culpable, which, when divested of all accessory circumstances, may be in itself, if not innocent, at least venial. On such occasions a prisoner ought to reflect calmly, and endeavour to separate in his own mind all aggravating or adventitious circumstances, which may have been stated by the pro-

secutor, from the fact itself; and he will then find no difficulty in arranging his evidence and in laying the real merits of the case clearly before the Court. If, however, he allows resentment to cloud his judgment, and is more desirous of exposing the prosecutor than of defending himself, he will undoubtedly fail in distinguishing the simple fact from its accessories, and will incur the risk of being found guilty, when, had another mode of defence been adopted, he might have been certain, if not of being acquitted, at least of being censured in a slight degree only. But if the prisoner is sensible that neither the fact nor the manner in which it is represented can be controverted, he ought to pass it over slightly, and direct his defence entirely to a vindication of the intention. In some cases an ingenuous confession of the offence charged, with a few short remarks on its having proceeded from inadvertence or inexperience, and on its being a first offence, accompanied by proper expressions of regret for having been betrayed into it, is the best of all defences. But as no person is obliged to accuse himself, and as an officer may not be sufficiently aware of the guarded manner in which any admission on a defence ought to be made, or of the effect which it might produce, it is better that he should take as little notice as possible of the facts which he cannot refute, and neither deny nor admit them. A

denial, whether direct or indirect, of facts that are proved must always throw a degree of suspicion over the prisoner's defence, and leave an impression unfavourable to the character of an officer who has recourse to it. As, however, the intention is the essence of an offence, a prisoner, whenever he cannot disprove the facts alleged, is at liberty to avail himself of every circumstance and of every motive which may tend to divest the charge of its alleged impropriety or culpability. In cases where the guilt depends entirely on the intention, as disrespect or supposed falsehood, a candid representation of circumstances as they actually occurred, supported by either direct or presumptive evidence to prove that the disrespect or deviation from truth was not intentional, will be at all times a sufficient defence. But in cases where the fact and the intention cannot be clearly distinguished, and the latter is not susceptible of proof, the prisoner labors under great difficulty; nor is it easy to state what kind of defence would be most effectual. It is here evident that all his hopes must depend much on his own former character, as this, if well established, might induce the Court to give considerable weight to such explanations as he might give, without being able to prove, of his own conduct. If, however, a prisoner dare not rely on such a circumstance, his only resource is then to attempt as much as

possible to disguise the truth and to lead the Court away from, or to perplex their attentive consideration of the real merits of the case. This attempt, it will be obvious, is one of peculiar nicety, and admits not of any particular rules which could promote its success, as it must depend entirely on the nature of the facts alleged and on the prisoner's ability. It must, at the same time, be observed, that in this hazardous experiment an officer should be very careful not to indulge in any assertions or statements which can implicate his veracity.

But, although a prisoner ought not to make any reflections on the witnesses, or recrimination on the prosecutor, which are irrelevant to the subject under investigation, he is still at full liberty to point out any inconsistencies or contradictions which may have occurred in the testimony of the witnesses, or any conduct on the part of the prosecutor which may be connected with the charge. He ought however, to make such remarks without warmth, and without any personal, ungenerous, or offensive allusions or assertions. For he may be assured, that though this restriction may restrain what he conceives to be an independent, eloquent, and dignified expression of his sentiments, it deprives him of no one advantage, but on the contrary contributes materially to his benefit.

“ It frequently happens that the tendency of a

question put to a witness may be to the prejudice of a third person who is no party to the trial. The consequence ought in justice and humanity to be avoided whenever it is possible; and in no case ought the prosecutor to be allowed this liberty of indirectly impeaching or affecting the characters of third parties, because it cannot be necessary to his purpose. But it may sometimes happen that the party accused may find it absolutely necessary to throw blame and even criminality on others, who are no parties to the trial; nor can a prisoner be refused that liberty which is essential to his own justification. It is sufficient for the party aggrieved, that the law furnishes ample redress against all calumnious or unjust accusations." * I am much afraid that the preceding passage of Tytler's Essay on Military Law, combined with the error which I have before pointed out, of Courts Martial being of opinion that the Court cannot interfere with the prisoner's defence, has occasioned many an irrelevant and highly improper defence. The position that a prisoner may exculpate himself by proving that the act imputed to him was committed by others, or that he was compelled or led to commit it by others, is undoubtedly true; and whenever it is evident that the prisoner's exculpatory proof has this and no other tendency, it

* Tytler, p. 506.

cannot in justice be rejected. But if, on the contrary, it is evident that the prisoner, in impeaching the character of others, is proceeding on vague and ill founded suppositions that something may appear in his favor, or where he is clearly actuated by resentment, and not by a wish to exculpate his own conduct, the Court ought immediately to check and throw out all such evidence, as neither tending to refutation, exculpation, nor extenuation.

CHAP. VII.

REPLY AND REJOINDER.

IN all cases where a prisoner calls witnesses in support of his defence, the prosecutor has a right to reply *; and under this privilege, he may either recapitulate and methodise the import of his evidence, and strengthen it by pertinent argument, or show the weakness and insufficiency of the proof in exculpation; and here in regularity the trial ends. But if the prisoner shall have, in his defence, impeached the credibility of any of the witnesses for the prosecution, it is competent for the

* The practice of courts of law is, that in all cases where a prisoner calls witnesses in support of his defence, the counsel for the prosecution has a right to reply. But in cases where no witnesses are called, no counsel for the prosecution, except His Majesty's Attorney and Solicitor General, has any right to reply. And if the counsel for the defendant should state in his address facts which he does not afterwards substantiate in evidence, the counsel for the plaintiff will have a general right to reply. There is, however, very rarely a trial before a Court Martial at which a prisoner does not call witnesses in support of his defence. But on this important point see Appendix No. II.

prosecutor to re-establish their character by new evidence; or if the prisoner in his defence shall have introduced any new matter encountering the evidence for the charge, but to which that evidence was not directed, the prosecutor is allowed to examine witnesses to that new matter. * It is hence

* The Deputy-Judge-Advocate at Lieutenant-General Sir John Murray's trial, observed, "I submit to the Court the line they would be bound to pursue is this. Admiral Hallowell is entitled to offer any evidence which has generally arisen out of the defence, and out of the evidence in defence; matters merely stated in defence and not proved, or which the Court has stopped, he will have the same opportunity of contradicting in his reply; but as to those which are actually proved in evidence, I suppose the Court will think he is at liberty to call evidence in reply; or in case the character of any of his witnesses has been attacked, he will be at liberty to support that, and I should think the Court will watch the evidence to prevent its going beyond that." P. 479. And again, "I would state, in some measure in answer to that, that new matter introduced in the defence, which the prosecutor had not reason to expect, and which therefore he could not be expected to meet in the original case, lets in evidence in reply." P. 480.

This opinion is in strict conformity to the practice of courts of law, where it is an established rule, "that the prosecutor has a right, after the prisoner has gone through his evidence, to call witnesses for the purpose of disproving any part of the prisoner's case, which could not have been anticipated by the prosecutor in the first instance, or in respect of which it was not necessary for him to advert to till it was set up by the prisoner."—"It is not very likely that the cross-examination

evident, and from the authorities quoted in the note, that as a reply is in most cases a matter of right, it cannot be legally denied to a prosecutor. But as the granting him any time to prepare it, or even to reduce it into writing, is an indulgence which depends entirely on the decision of the Court, should a Court Martial be of opinion that a reply is unnecessary, they may require the prosecutor to deliver it verbally and immediately on the defence being closed. Such a requisition will in general prevent the prosecutor from detaining the Court with a reply; as he will rather waive the privilege, than dictate his remarks without preparation to the Judge-Advocate.

It will also be evident that the Court cannot legally prevent a prosecutor from calling witnesses

of the prisoner's witnesses should be so unskilfully conducted as to produce exculpatory matter in favor of the prisoner. If, however, such a case should occur, I doubt much whether the Court would not interfere, and prevent the prosecutor giving evidence to contradict such exculpatory matter produced by his own examination. On the other hand, if questions are put to the prisoner's witnesses on cross-examination, respecting any part of the *res gestæ* of the charge, and their answers contain any material untruths, it would be competent for the prosecutor to disprove them by fresh evidence."

The above is an official opinion given by the Advocate-General of Bombay.

for the purpose of disproving any new matter which may have been given in evidence by the prisoner on his defence. Should they think that it was unnecessary to disprove it, they may recommend to the prosecutor not to call any witnesses; but if he insist on adducing fresh evidence, they cannot refuse to receive it. At the same time, the Court are, undoubtedly, the sole judges to determine whether or not any new matter has been introduced by the prisoner; and it is their acknowledged duty not to permit a prosecutor, in reply, to adduce any evidence which ought to have been given on the prosecution, or to enter into a new proof of the charge. But it must be obvious that every refutation of the defence must tend in some degree either to support the charge, or to prove that the act of which the prisoner is accused was intentional and consequently culpable. In deciding, therefore, whether or not any new matter has been introduced by a prisoner on his defence which ought to let in evidence in reply, the Court ought to consider solely whether this matter applies so directly to the charge, that it ought to have formed part of the prosecutor's original case, or whether it consists of circumstances which the prosecutor could not anticipate, or which it was unnecessary for him to notice, as not being requisite for the full and proper substantiation of the charge. In the former of these cases

evidence is not admissible, but in the latter it cannot be legally rejected.

I am, at the same time, aware that there have been Courts Martial which have decided that, as the new matter did not tend to refute the charge, but merely to extenuate the prisoner's conduct, the prosecutor should not be allowed to call witnesses for the purpose of disproving it. But had this decision been exactly the reverse, it would have been more consistent with law and justice; for had the prisoner's defence directly rebutted the charge, no part of it could be considered as new matter, nor could the prosecutor have adduced evidence to controvert such a defence, without entering into a new proof of the charge, and placing the prisoner again on his trial; an injustice which no Court Martial, properly informed, would ever permit. New matter, therefore, must always originate in circumstances which have a consequential tendency only to refute the charge, or in such as tend merely to exculpate or extenuate the prisoner's conduct. In the first case it is sometimes difficult to decide whether or not the circumstances adduced by the prisoner ought to have been given in evidence on the prosecution. But it may be laid down as a general rule, that should the prosecutor have supported the charge by positive proof, it was not necessary for him to have had recourse

to presumptions; and if by circumstantial evidence of the strongest kind, it was not requisite for him to have noticed the weaker. If, then, the prisoner produce presumptions in opposition to positive proof, or weak in opposition to strong presumptions, these circumstances must be considered as new matter; and as they might, if unexplained and uncontroverted, lead to conclusions in favour of the prisoner, the prosecutor has a right to call witnesses for the purpose of preventing such conclusions.

But no difficulty can ever arise with respect to a defence which is not intended to refute the charge, but merely to extenuate the prisoner's conduct. For in this case, every circumstance must be new matter, and, however weak and seemingly irrelevant to the charge it may be, it is impossible for the Court to judge what effect this matter, if it remain uncontroverted, may have, either on the final opinions of the members themselves, or on the mind of the approving officer. It is certainly a most invidious duty for a prosecutor, after having proved the guilt of a prisoner, to be obliged to rebut the pleas which he may urge in extenuation of his conduct. But as the intention is the essence of every crime, and as the prosecutor can scarcely in any case prove the intention of the prisoner, further than by the legal inference drawn from the act

itself of which he is accused, and as almost every occurrence admits of being represented in two different manners, it must be obvious that the real truth of the case could never be ascertained, if the evidence adduced by the prisoner in support of his own statement of his motives and actions were not allowed to be disproved. In some cases the disproving it will, no doubt, have the effect of entirely changing the object of the trial, and of diverting the investigation from the conduct of the prisoner to that of the prosecutor, or even, perhaps, of a third person. But this consequence cannot be avoided, as long as prisoners are permitted to exculpate themselves by criminating others; and if Courts Martial will not prevent prisoners from making their defences the vehicles of aspersion and calumny, they cannot in equity or justice prevent prosecutors from disproving such aspersion and calumny, however irrelevant they may be to the charge. *

* It may not perhaps be unnecessary to explain, by an example or two, what is to be considered as new matter on a prisoner's defence. Suppose (if possible) a prisoner accused of having been concerned in a mutiny, and the prosecutor proves the charge by two competent witnesses, who depose positively to the fact. The prisoner rests his defence on the proof that the prosecutor has been misinformed, for that the mutiny depose to never occurred, and that he consequently could not be concerned in it. In this case, into whatever

In all cases where the prosecutor has adduced evidence in reply, it is the practice of Courts Mar-

evidence the prisoner might enter, as every circumstance of it must apply directly to the charge, it ought to have been anticipated by the prosecutor; and he cannot therefore be allowed to adduce evidence in reply to controvert it. He is merely at liberty to impeach the credit of the prisoner's witnesses. But suppose a superior officer accuses an inferior officer of having written to him a disrespectful letter, it is evident that nothing more is requisite for the substantiation of the charge than the prosecutor's producing the original letter, and proving it to be the writing of the prisoner; for it is the province of the Court to decide whether or not the style and contents are disrespectful. The prisoner, on his defence, does not deny the letter, but rests his exculpation on the proof that the assertions and statements contained in it are true. Here every circumstance adduced by the prisoner must be new matter, as it could not have formed a part of the prosecutor's original case, and it must therefore let in evidence in reply. Or, suppose an officer is charged with disobedience of orders and disrespect to his commanding officer. The prosecutor proves that the order was issued and circulated in the usual manner, and two competent witnesses, who were present at the time, depose to the disrespect. On his defence the prisoner endeavours to prove that he never saw the order, as he was from home when it was brought to his quarters; or that it never was brought to his quarters; and that, with regard to the disrespect, it was impossible that he could have been guilty of it, from the friendly terms on which he was with the prosecutor at the time, and from nothing having then occurred to irritate his

tial to permit the prisoner to make a rejoinder that is, to address the Court, and by argument and pertinent observation to invalidate the remarks and proof of the reply, but the prisoner can adduce no further evidence except for the purpose of re-establishing the character of his witnesses, if it shall have been impeached by the prosecutor. *

feelings, and that for this and other reasons the witnesses on the prosecution were not to be credited. In this case, not one of the circumstances on which the prisoner relies for his exculpation as they are merely presumptions in opposition to positive proof ought to have been adduced by the prosecutor, and he has therefore a right to adduce evidence in reply to disprove them.

* The Judge-Advocate-General at Colonel Quentin's trial observed, "The prosecutor opens his case and calls his witnesses; then the prisoner enters upon his case; and then the prosecutor has a reply upon the whole. The prisoner has been sometimes permitted to address the Court afterwards, but that is not the regular course, nor consistent with the ordinary rules of the Court." P. 34.

It is also usual in courts of law to allow the counsel for the defendant to address the jury on any new evidence which the prosecutor may adduce in reply; but this address is delivered previous to the counsel for the prosecution entering into his general reply, and is strictly confined to such new evidence.

I am therefore surprised that James should have published the following apparently hasty remark of Sir Charles Morgan, as its inaccuracy must be obvious:—"Some doubts have arisen as to a prisoner's having a right to rejoin to the reply

of the prosecutor; this mistake, however, is probably grounded on the supposition of a case which rarely happens, of a prosecutor being permitted to introduce new evidence in his reply, in which case the prisoner is entitled to be heard upon such new evidence, and the prosecutor will, in return, be entitled to a reply to the same extent. If the prosecutor in his reply introduces perfectly new matter (which in strictness is irregular) without calling new evidence, it is but fair that the Court should stop the prosecutor from going into such new matter; or if he is permitted to go into it, to hear the prisoner afterwards to such new matter."—Advertisement to James's ed. of Tytler, p. xviii.

In this remark the words "new evidence" must apply to a new proof of the charge, as Sir Charles Morgan admits that "the prosecutor is allowed by argument to reply, but not to bring evidence, unless new matter has been brought forward on the defence;"—but the text will perhaps evince that the thus placing a prisoner again on his trial is both irregular and unjust. The words also "new matter" in the prosecutor's reply are not very intelligible, for unless every observation and argument contained in it were new, that is, not before stated to the Court, the reply could be of no use whatever. If, however, it be merely intended that where the prosecutor introduces in his reply such observations and arguments as could not have been anticipated by the prisoner whether supported by evidence or not, it is usual to allow the prisoner to rejoin; this opinion is in conformity to the general practice of Courts Martial. But I do not believe that there ever was an instance of a prosecutor's being allowed to reply to a rejoinder under any circumstances whatever. Should, however, this part of the remark refer to the practice of courts of law, the whole and not part only of that practice ought to be adopted; that is, the prosecutor should first adduce his evidence in reply, the prisoner then address the Court on

this evidence, and then the prosecutor enter into his general reply. But the practice of Courts Martial is different, and there the prosecutor closes his reply before the prisoner rejoins, which gives a prisoner the advantage of addressing the Court last.

CHAP. VIII.

OF EVIDENCE.

SECTION I. *Competency and Examination of Witnesses.*

II. *Written Evidence.*

III. *Legal Nature and Credibility of Evidence.*

IV. *Examination of Witnesses by the Court.*

A KNOWLEDGE of the numberless niceties and distinctions of what is or is not legal evidence to a jury, can never be requisite in members of Courts Martial; for the charges submitted to their investigation are, or ought to be, in every case, supported either by positive proof or by the strongest presumptions. But, as it is of essential consequence that the general principles of the law of evidence should be understood by all military persons, who may either be called upon to discharge the important functions of judges in a military tribunal, or to sustain the more painful character of parties in its proceedings, it will be necessary to lay down, in as concise a manner as possible, the principal rules relative to evidence which are held to be legal.

Evidence, therefore, is of two kinds. *Parol*, that is, such as is given by witnesses in open

Court, and written, which consists of Records, deeds, and other authentic and probative papers, or military orders, letters of correspondence, books of accounts, receipts, &c.; and with regard to these several kinds of evidence the following rules are to be observed.

SECTION I.

Competency and Examination of Witnesses.

ALL persons of whatever religion or country that have use of their reason are to be received and examined as witnesses * except such as are infamous, or are interested in the cause.

* I have known (says Mr. Christian) a witness rejected and hissed out of Court who declared that he doubted of the existence of a God, and a future state. But I have since heard a learned Judge declare at Nisi Prius, that the Judges had resolved not to permit adult witnesses to be interrogated respecting their belief of a Deity and a future state. — 3 Blackstone, 369. *note.*

But Peake, in his Law of Evidence, p. 149., mentions that, "in a late case before Mr. Justice Buller, he would not suffer the particular opinions of man, professing the Christian religion, to be examined into; but made the only question, whether he believed the sanction of an oath, the being of a Deity, and a future state of rewards and punishments. But a person who has no idea of the being of a God or a future state is not admitted" [as a witness].

Persons are rendered infamous by having been attainted of false verdict, or convicted of perjury, forgery, conspiracy, or of other crimes and misdemeanours which it is not necessary to enumerate.*

But no person can be rejected on account of infamy, unless a copy of the record of his conviction be produced.

A witness may be examined on the *voir dire* with regard to his own infamy, if the confession of it does not subject him to any future punishment; as a witness may be asked if he has not stood in the pillory for perjury. But though he may be asked this to discredit his testimony, he cannot be entirely rejected as a witness without the production of the record of conviction, by which he is rendered incompetent.

An infant, if fourteen years of age, may be sworn as a witness; and if under that age, and it appears that he has competent discretion, he may also be sworn; but in no case shall an infant be admitted as evidence without oath.

* But the conspiracy or misdemeanor must be of a heinous nature to disqualify; as it has been lately decided that it is the nature of the offence and not of the judgment or the punishment which renders a party infamous and therefore incompetent as a witness. Offences of an inferior degree only go to his credit.

Husbands and wives can neither be witnesses for nor against each other in any action, wherein one of the married persons is a party. But the wife may lawfully give evidence in a suit or trial between other persons, of which the issue may be contingently beneficial or disadvantageous to her husband, and *vice versa*; though the credibility of such testimony must of course be suspicious.

But every other relation of kindred, as well as servants in the cause of their masters, are competent witnesses, although the Court will receive their evidence under all its circumstances of suspicion.

Counsel and attornies or solicitors cannot in any case be called upon to give evidence which may disclose the private business or secrets of their clients; or to produce papers which may have been delivered to them by their clients, as evidence against them. But this privilege is strictly confined to attornies or counsel acting in the cause, and cannot be extended to others, though professionally and confidentially employed.

This rule of professional secrecy extends only to the case of facts stated to a legal practitioner for the purpose of enabling him to conduct a cause; and, therefore, a confession to a clergyman or priest for the purpose of easing the culprit's

conscience, the statement of a man to his private friend, or of a patient to his physician, are not within the protection of the law. It would certainly be thought that the friend or physician, who voluntarily violated the confidence reposed in him acted dishonorably, but he cannot withhold the fact if called upon by a court of justice. *

A prisoner, if not under trial, is a competent witness.

A *particeps criminis*, or an accomplice, if not under trial or convicted, is a competent witness either for or against those who are accused of having been concerned with him in the commission of the same offence. †

In case two or more prisoners are tried together for the same offence, and it appears from the prosecution that the charge is not proved against one or more of them, it is competent for a Court Martial, in their sound discretion, to acquit these particular prisoners immediately, in order that the others may benefit by their evidence on their defence. ‡

* Peake's Law of Evidence, p. 188.

† The opinion, therefore, of Tytler, p. 276., and of M'Arthur, vol. ii. p. 126., is contrary to established law. — 1 Hale, P.C. 304. Conviction by Courts Martial does not operate as an incapacity, except for offences not military but criminal.

‡ McNally's Rules of Evidence, p. 56.

respecting the exact degree of interest in the cause, which shall render a person an incompetent witness, the law is far from being fixed; for it is held as an incontestible rule, in all cases, that it is a good exception to a witness, that he is either to be a gainer or loser by the event of the cause; whether such advantage be direct and immediate or consequential only.*

But so many exceptions to this rule are at the same time admitted in courts of law †, that it would seem safest for Courts Martial, when interest is objected to a witness, to decide in general that such objection shall go to the credibility only, and not to the competency of the witness.

But a person who either receives or has been promised a pecuniary reward, or a benefit of any kind whatever to himself or to his family or friends,

* A Hawk's P. C. p. 452.

† Christian in his notes to Blackstone, vol. iii. p. 369, observes, that it is now established, that if a witness does not immediately gain or lose by the event of the cause, and if the verdict in the cause cannot be evidence either for or against him in any other suit, he shall be admitted as a competent witness, though the circumstances of the case may in some degree lessen his credibility.

And Tytler, p. 273., observes, "But the law holds, that the gain or loss must be immediate and certain, and not contingent or barely possible."

or who receives or is promised the release of any obligation by the party who calls for his testimony, is incompetent as a witness on account of his interest in the cause.

A person, also, who has been threatened with vengeance of any kind, or any manner of mischief to himself, if he should refuse to give evidence in a certain way, is an incompetent witness for the party who has so threatened him; and reason argues that his testimony *against* that party, though not absolutely inadmissible, is yet very suspicious, from the obvious motive of revenge and malice.

It is no good exception to the competency of a witness that he has received a reward, for having made a discovery of the crime to be proved against the prisoner, or for having apprehended the prisoner; or that he has had the promise of a pardon or other reward on condition of giving his evidence, unless such reward be promised in order to induce him to give such and such particular evidence.

Parties to a trial being allowed to support their witnesses, money received *bona fide* for that purpose does not render the witness incompetent.

In all Courts Martial the prosecutor or informant is allowed to give evidence against the

party accused; nor can the Court refuse to receive such testimony, although they will give to it the degree of credit only to which they conceive it is entitled.

Interested witnesses may be examined upon the *voir dire*, if suspected to be secretly concerned in the event; that is, an oath *veritatem dicere*, to answer all such questions as the Court shall demand, relative to their interest in the point at issue; or their interest may be proved in Court.

The exception to the competency of a witness ought in strictness to be stated before he is sworn; but it is, also, competent for a Court Martial, at whatever stage of a trial the incompetency of a witness appears, to arrest his evidence and to discharge his testimony from their minds.

The prosecutor and prisoner are both allowed to take exceptions to the competency of a witness, which are to be stated in open Court, and recorded on the proceedings of the trial, after which the Court decide on their validity.

All military persons are bound, under the penalty of disobedience of orders, to attend and give evidence in all military courts whenever required so to do by a proper authority.

And with regard to persons in a civil capacity who are not subject to military law it is enacted,

in the 20th clause of the Annual Mutiny Act, "that all witnesses so duly summoned as aforesaid, (that is, by the Judge-Advocate or person officiating as such,) who shall not attend on such courts shall be liable to be attached* in the Court of King's Bench in London or Dublin, or Court of Session, &c. in Scotland, in like manner as if such witness had neglected to attend on a trial in any criminal proceeding in that Court." But no witness is bound to appear in consequence of such a summons, unless his reasonable expenses be tendered him; and a writ of attachment will not be granted by a court of record unless it be proved that the summons has been duly served, and that a sufficient tender has been made to the witness for his expenses.†

* Attachment is a writ issued by a court of record against a person for some contempt for which he is to be committed. When the offender is apprehended and brought into Court, and the contempt proved, "the Court will proceed to correct him by fine or imprisonment, or both, and sometimes by a corporal or infamous punishment." — 4 Blackstone, 287.

† "It must first be remembered, that there is a process to bring them (witnesses) in by writ of *subpoena ad testificandum*; which commands them, laying aside all pretences and excuses, to appear at the trial on pain of 100*l.*, to be forfeited to the King; to which the statute 5 Eliz. c. 9. s. 12. has added a penalty of 10*l.* to the party aggrieved, and damages equivalent to the loss sustained by the want of his evidence. But no witness unless his reasonable expenses be tendered him is bound to appear at all; nor if he appears, is he bound to give evidence till such charges are actually paid him." — 3 Blackstone, 360.

By the same clause of the Mutiny Act it is likewise enacted, "that all witnesses duly summoned by the Judge-Advocate, or the person officiating as such, shall, during their necessary attendance in such courts, and in going to and returning from the same, be privileged from arrest, in like manner as witnesses attending any of His Majesty's courts of law are privileged. * . .

Witnesses at Courts Martial are examined separately, and no witness is permitted to be present during the examination of another.

But should any circumstances render requisite the evidence of a spectator or a member of the Court; there is no objection to his being examined as a witness, although he has been present during the whole of the preceding part of the trial.

It is also competent for the Court to confront any two or more witnesses, that is, to call into Court at the same time any two or more contradictory witnesses on the same side, and to endeavour to reconcile their testimony, by reading over to each the evidence of the other, and by requiring an explanation of such parts as are inconsistent or contradictory, in order to ascertain as far as possible the real truth of the case. †

* But there is no similar provision in the Mutiny Act for the better government of the Honorable Company's forces.

† Adye, 201, 202.

All witnesses must be duly sworn, and give their evidence, in presence of the Court and of the parties.

But in exception to this general rule, it has been repeatedly determined that on a trial for murder the declaration of the deceased, after the mortal wound is given, conscious of approaching death, may be received in evidence against the prisoner, although such declaration was not made in his presence.

It sometimes happens that a material witness is prevented from attending the trial in consequence of sickness, or of his being at such a distance that his attendance could not be conveniently procured; and it therefore not unfrequently becomes a subject of discussion at Courts Martial respecting how far and in what manner the deposition of an absent witness can be received in evidence. But as the rule of law is clear and distinct on this point, that all evidence must be given in presence of the Court and parties, it must follow that such a deposition, whether in the form of an affidavit or in any other form, is not admissible evidence. Courts of law, however, admit examinations *de bene esse* to be read in evidence, and Courts Martial may, therefore, with propriety, adopt the same practice. An examination *de bene esse* is an examination of witnesses who are prevented

by any just cause or impediment from attending the trial, taken upon oath before a justice of peace to interrogatories put to them by the parties on the trial, or by persons duly appointed by them for that purpose. But this examination cannot take place except with the mutual consent of the parties. Courts Martial, also, sometimes direct the interrogatories which are wished to be put to an absent witness to be framed in Court from the questions that may be proposed by the parties or the Court, and then transmit them to a proper person at the place where the witness resides, in order that his answers may be received upon oath before a justice of peace. But the legality of this mode is questionable. *

* The objection to this mode is that it deprives the opposite party of an opportunity of cross-examining the witnesses; whereas at examinations *de bene esse* the cross-examination takes place in the same manner as in Court. Blackstone enumerates, as one of the defects of trial by jury, the want of powers to examine witnesses who are prevented from attending the trial and to receive their depositions in writing at the place where the witnesses reside. Courts Martial may, therefore, be assured that they are promoting the ends of justice in receiving as evidence the depositions of an absent witness, which are taken in such a manner as to be fully satisfactory to the parties, although they may, in so doing, depart in some degree from the strict rules of legal evidence. But they ought in every case to be perfectly satisfied that the non-attendance of the witness is occasioned by some just cause or impediment.

The form of the oath to be administered to a witness is not prescribed by the Mutiny Act or Articles of War; and it is held, that there is no particular form essential to the oath to be taken by a witness; but as the purpose of it is to bind his conscience, every man of every religion should be bound by that form which he himself thinks will bind his conscience most.*

“When a witness is not liable to any legal objection, (and after he has been duly sworn,) he is first examined by the counsel for the party on

* At Courts-Martial witnesses, who are Protestants, are sworn by their laying their right hands on the open Evangelists; while the oath is recited, and afterwards kissing them. But in swearing those who are Roman Catholics, the book containing the Evangelists is closed, and has marked upon the outer cover a cross, or a crucifix is placed upon it, which the witness, after the oath is recited, kisses.

The usual oath administered is as follows:—“The evidence you shall give in the matter now before this Court, between our Sovereign Lord the King and the prisoner trying, shall be the truth, the whole truth, and nothing but the truth:—so help you God.”

Jews may be sworn by the Judge-Advocate on the old Testament, and natives of India or foreigners, who are Roman Catholics, may also be sworn by him in the manner just mentioned. But it is most advisable that in both of these cases a rabbi and a priest be employed to administer the oath, in order to give it the greater force and sanctity. A priest also of their respective religions is always required to swear in a Muhammadan, Hindu, or Parsee.

whose behalf he comes to give evidence, as to his knowledge of the fact he is to prove. This examination, in cases of intricacy, is a duty of no small importance in the counsel; for on the one hand the law will not permit him to put what are called leading questions, viz. to frame them in such a way as would instruct the witness in the answers he is to give; so on the other, he should be careful that he makes himself sufficiently understood by the witness, who may otherwise omit some material part of the case.

“ Of late years the rule has been somewhat relaxed in the case of an original examination, and where it evidently appeared that a witness was hostile to the party by whom he was called, and unwilling to answer questions put to him, the examination in chief has been permitted to assume the appearance of a cross-examination and leading questions to be put to a witness. It is impossible to point out the cases in which the general rule of law shall be so departed from, and therefore it must be left wholly to the discretion of the Judge, who, in general, is guided by the demeanour of the witness, and the situation he stands in with relation to the parties.

“ The counsel retained on the other side next cross-examines the witness; and the witness not being supposed so friendly to his client, as to the

party by whom he is called, he is not restrained to any particular mode of examination, but may put what questions he pleases. He may, for the purpose of trying the credit of a witness, suppose facts apparently connected with the cause, which have no existence but in his own imagination, and ask the witness if they did not happen. No mischief can arise from this course of examination; for if the witness is determined to speak nothing but the truth, he will deny every thing so suggested, and the testimony of every other who is called will confirm him. But it frequently happens, on the other hand, that witnesses who have entered into a wicked conspiracy to defeat justice, and who, having made up their story together agree on the general feature of the case, will, when examined out of the hearing of each other, by their variations in little circumstances as to which they are unprepared, and by their contradictions, be rendered utterly unworthy of credit. A cross-examination to this extent has never been objected to; but how far a counsel may, on cross-examination, enquire into matters foreign to the cause, for the purpose of affecting the character and credit of the witness, is at present not very well settled." *

* Peake's Evidence, p. 146, &c.

I have quoted the preceding long passage in consequence of there being no point which occasions such frequent doubts and discussions at Courts Martial as the proper manner of examining witnesses. With regard, indeed, to an examination in chief, a Court will immediately check or correct any irregularity as soon as it is pointed out to them, as they are, in general, sufficiently aware that when a witness is examined by the party who calls him, all the questions then put to the witness ought to lead to the fact indirectly and obliquely, but never directly and immediately. But in respect to cross-examination it is absolutely impossible, from the variety of opinions entertained on the subject supported by the variety of decisions of Courts Martial, to ascertain what is the established practice of Military Courts. It must, however, be obvious, that were the party cross-examining a witness at a Court Martial at liberty to put what questions he pleases, it would be productive of the greatest delay and inconvenience. For all the proceedings are taken down in writing, and there is scarcely ever any person present who is qualified, by his legal knowledge and experience, to point out where such an examination might be carried, as it would probably always be to a greater extent than the law permitted. But it will be equally obvious that the decision of the

Court Martial*, mentioned in the note, and which is the most common one, rests upon two parallel grounds, as a cross-examination so restricted could never tend in any respect to ascertain the degree of credibility to which the witness was entitled, or to detect any falsehood which he might wish to impose on the Court.

The safest rule, therefore, which a Court Martial can adopt, as it least departs from the practice of courts of law, and at the same time tends both to elucidate the truth of the facts on which the Court

* In the course of the proceedings of a Court Martial at Calcutta, April, 1809, Lieutenant-Colonel Hawker president, a question arose whether a witness, on cross-examination, could be interrogated touching any matter not previously before the Court. Mr. Lewin and Mr. Ferguson, counsel for the prisoner, argued ably in support of the affirmative of the question. The Court having been cleared again opened, and pronounced their opinion in the negative, deciding that conformably to the usual practice of Courts Martial a witness cannot be cross-examined relative to any matter not previously in evidence before the Court. This decision is in conformity to the following passage in Tytler: — "When he (the prosecutor) has finished his interrogatories, the prisoner is allowed to cross-question, that is, to put any relevant questions that may occur to him, arising from and relative to the evidence already given." This opinion is in conformity to the practice of the law of Scotland, but it is certainly not in conformity to that of the law of England, as must be obvious to every person who has attended an English court of justice.

are to decide, and also to ascertain the credibility of the witness, is, that a witness on cross-examination may be interrogated respecting the motives by which he is actuated in giving his evidence, or his own interest in the cause, or respecting the facts stated in the charge, or the matter antecedently given in evidence either by himself or other witnesses.

Courts Martial, in general, wish to restrict the cross-examination to such matter only as immediately relates to the charge; but, if they admit extraneous matter on their proceedings, they cannot either equitably or legally prevent the party who thinks himself affected by it from cross-examining into the same matter.

But it must be most particularly observed that witnesses called to speak to character only are not liable to be cross-examined as to particular points respecting the character which they may give. On this point the following decision of the Court at Colonel Quentin's trial explains both the law and the grounds on which it rests in the clearest manner. "The question submitted for the decision of the Court was this, Can you state the particular instances in which you have had an opportunity of judging of Colonel Quentin's conduct and merits? The decision of the Court is, that the question as

worded may properly be put to the witness, and the grounds upon which their decision is founded are, that in calling any witness to general character, the character that he gives is his opinion; that it is, therefore, perfectly open to the party on the other side to ask him what means he had of forming an opinion. But the Court proceed further to state, that when the question is answered, it will not then be in the power of the party putting it to cross-examine into any of those instances which may so have been stated; and upon this principle, that upon those instances the Court are not called upon here to decide; that those instances the officer upon trial is not called upon here to answer; and those instances might, and probably would, involve the characters of other officers not before the Court, and which they have no opportunity of defending." *

If in the course of the cross-examination any new matter is introduced, the party producing the witness has a right to re-examine into such new matter; but no party is to be allowed to enquire into any other matter under the plea of a re-examination.

The late Judge-Advocate-General on Colonel Quentin's trial observed, "the mode in proceed-

* P. 195.

ings of this nature is for the party calling a witness first to examine him in chief, then for the other party to cross-examine him. If new matter is introduced, there is then a re-examination on the part of the person calling him, and after all, if the Court see any reason to ask any question to make up their mind, then they do it; but it must be evident to all parties, that unless that course is pursued, if a sort of fluctuating mode is pursued, of one party putting questions, and then another, continually backwards and forwards, it must be very inconvenient, for it confuses the case; it is inconvenient to the parties themselves, and certainly it is not consistent with the ordinary course of proceedings." *

If, however, either party after this regular examination of the witness finds that he has omitted to ask some material question, he may submit it to the President of the Court; and the Court, if they think fit, as they generally do, put the question

* P. 170. — The same opinion was given by Sir Charles Morgan, who observes; " When a witness is called, it is best to allow the party calling him to go through the whole of his examination, without the interruption of questions, either by the Court or the prisoner, and then the prisoner may examine; after which, if any point wants elucidation, the Court and the Judge-Advocate will propose such questions as may be thought necessary." — Advertisement to James's edit. of Tytler, p. xvii.

themselves, when it appears in a regular stage on the proceedings. *

The oath administered to the witness is not only that what he deposes shall be true, but that he shall also depose the whole truth; so that he is not to conceal any part of what he knows, whether interrogated particularly to that point or not.

But this rule of law is never, I believe, acted upon strictly in courts of law, and most certainly it never is at Courts Martial; where it would be considered irregular to admit a witness, called upon to speak to some particular point, to enter into a full detail of all that he might know relative to the subject under investigation.

If, however, a witness, as is frequently the case, is required to relate all that he knows respecting the charge; or if he be asked if he can give any further

* The Judge-Advocate-General at Lieutenant-General Whitelocke's trial observed; "I believe it to be the practice of Courts Martial, as it is the practice of every court of justice, without exception, in this country, that if it should so happen that an important question appears not to have been asked by those who conduct the prosecution after their evidence is closed, that question is handed up to the Judge, and the Judge, as I have always heard, and in my own experience have always seen, has not made the slightest objection to put the question to the witness." (P. 440.) This remark applies equally to any important question which may have been omitted to be asked by the prisoner.

information on the subject than what he has already deposed, he is then bound to speak the whole truth, and not to conceal a single circumstance which can tend to prove the points in issue.

But a witness is bound merely to depose to the allegations specified in the charge; and he is not to enter into any irrelevant matter or into the conduct of persons not concerned in the trial.

In all cases, however, of mutiny, sedition, or other combination, the declared intentions and acts of the prisoner's accomplices, and every circumstance, whether arising from verbal or written communications, which can tend to prove their plan and object, may be given in evidence against the prisoner. For if it be proved that he was privy to the combination, every thing that is done by the different parties in it must be imputed to him. In such cases evidence may be first adduced to shew that a combination did exist, and the prosecutor must then prove, in order to affect the prisoner, that he was privy and consenting to it. *

The attestation of a witness must be only to what he actually knows from his own observation of the facts alleged in the charge; and he is not to

* For the law on this subject, see Hardy's trial in the 24th vol. of the State Trials.

be examined as to what he has heard; or been informed of by others; for his testimony, being in that case a reference to the information of another who is not upon oath, nor liable to be cross-examined, is no evidence at all.

In all cases a witness may swear to a report, or that so and so other persons have said, (for it may be material to prove that there was such a report) though he can give no evidence to the truth of the matters reported.

So, likewise, though hearsay is no direct evidence, yet what a witness hath been heard to say at another time may in be given evidence, in order either to invalidate or to confirm the testimony which he gives in court.

But a witness may depose to what he has heard the prisoner say; for verbal confessions, and what a prisoner has been heard to say at any time in conversation, or by observation, relative to the matter in issue, may be given in evidence against him, but they cannot be given in evidence for him.*

* On Hardy's trial at the Old Bailey sessions in 1794, the opinion of the Court was given on this subject in the following words: "That nothing is so clear as that all declarations which apply to facts, and even apply to the particular case that is charged, though the intent should make a part of the charge, are evidence against a prisoner, and are not evidence for him; because the presumption upon which accusations are

Such confessions, therefore, cannot be received as evidence on the prisoner's defence; but he may cross-examine the witnesses on the part of the prosecution, as to any thing they may have heard him say relating to the fact with which he is charged.

As, however, the human mind under the pressure of calamity is easily seduced, and liable on the alarm of danger to acknowledge indiscriminately a falsehood or a truth, as different agitations may prevail; a confession, whether made on an official examination or in discourse with private persons, which is obtained from a defendant either by the flattery of hope, or impressions of fear, however slightly the emotions may be implanted, is not admissible evidence; for the law will not suffer a prisoner to be made the delusive instrument of his own conviction*. If also the confession of a pri-

vidence, is, that no man would declare any thing against himself unless it were true; but that every man, if he was in difficulty, would make declarations for himself. Those declarations, if offered as evidence, would be offered, therefore, upon ground which entitled them to credit." *State Trials*, vol. xxix. pp. 1093, 1094.

* *Hawkins*, 495. This rule applies equally to the statements which officers are sometimes required to give of any improper conduct in which they may have been implicated, and consequently such statements cannot be received in evidence on the subsequent trial of the persons making them.

cannot be taken on oath, it cannot be read against him.

But Courts Martial do not for the same reason, which induce them not to proceed to conviction on the prisoner's pleading guilty on arraignment, adhere to the rule of law, that if the confession of a prisoner be voluntarily made, and regularly proved at the trial, it is sufficient to convict the prisoner without any corroborating evidence to support it; but in all cases require that the charge shall be proved by other evidence than the confession of the prisoner whether made by himself in court or proved by parol evidence. All, therefore, that Tytler and M'Arthur have written on this point, however conformable to the practice of courts of law, is directly contrary to the established practice of Courts Martial.

It is the established practice of Courts Martial that witnesses shall answer such questions of opinion as may be put to them by the parties on the trial, or by the Judge-Advocate or the Court; for unless such evidence was received it would be

* 4 Hawkins, 425. M'Nally, p. 47.

† On his trial Lieut.-General Whitelocke, assisted by counsel, objected, on a question being asked by the prosecutor, to questions of opinion being put to the witnesses, and supported his objections by every argument which the practice of the courts of law or legal experience could supply; but they were overruled, and the question put.

impossible in many cases, such as disrespect, drunkenness on duty, quitting a post or division without necessity, &c., for the Court to come to any decision on the guilt or innocence of the prisoner.

But questions of opinion ought always to be restricted to such facts or circumstances as are material to the proof of the charge; or such as are founded on the local knowledge or personal observation of the witness; or such as it is not possible for the Court themselves to form an opinion upon.

On this point the remarks of Tytler are evidently erroneous, for he lays it down as a rule, (a rule often quoted at Courts Martial) "that no party on a trial is entitled to obtrude the opinions of a witness upon a court or jury, or to call upon a witness to answer questions of opinion;" and yet he admits that at Courts Martial there is often

At Colonel Quentin's trial the Judge-Advocate-General observed, on a question being proposed by the prosecutor:

"Every opinion is admissible of a military man, where it is founded on local knowledge, or circumstances which are not within the reach of all the members of the court; but where it is merely a question of military science to affect the officer who is undergoing his trial, it is obvious that the Court is met for no other purpose but to try that; and that they have before them the facts in evidence on which they are to ground their conclusions." P. 38.

of strict propriety and even necessity for the witnesses answering such questions. But in such cases he is of opinion, and Mr Arthur concurs with him, that it is the Court only who can call upon the witness to give his opinion. It would, however, be most singular were the parties on a trial precluded from putting questions which this author himself admits are of strict propriety and even necessity; and it may, therefore, be supposed that he has been led into a mistake by notions derived from legal practice. For, as all evidence originates with the parties, the regular course of examining witnesses and the authorities quoted below are sufficient to evince, that, according to the practice of military law, the parties on a trial may, without previously applying for the permission of the Court, put questions of opinion to the witnesses; and that as long as the parties confine themselves to such questions as are above described it is not competent for the Court to prevent or to interrupt such an examination. But in this case, as well as in all other cases, it is undoubtedly competent for the Court to check or reject all improper questions which may be proposed.

Except in the case of questions of opinion, a witness, when under examination in chief, that is, when examined by the party who calls him, is not allowed to depose, that he thinks or is persuaded,

he believes; but he must, as far as his knowledge of the facts enables him, depose positively to the fact. But his belief is evidence on the cross-examination whether examined on the part of the crown or of the prisoner.

The witness, however, after having given an examination in chief, first answered the question positively, is at liberty to add to that answer any explanation relative to the subject of the question or his knowledge of it which he may think necessary.

Professional men, when called upon to give evidence on any point connected with their profession, are always examined to the best of their skill and knowledge.

No witness is permitted to read his evidence to the Court; but it is neither illegal nor improper for the witness to make use of written notes for the aid of his memory, and for the greater precision of his testimony.

These notes, however, must be separate and distinct memoranda; and the witness is not to be permitted to refer to any detailed and connected statement in writing of the evidence which he is giving: nor are such notes to be considered to increase or confirm the credibility of his testimony unless they

were written immediately after the occurrence of the fact or facts to which they relate.

The credit of a witness may be impeached, but it must be by general accounts only of his character and reputation, and not by proofs of particular crimes of which he was never convicted. And therefore it has been repeatedly decided, that, where the character of a witness is impeached by the testimony of other witnesses, the first question must be, whether the witness called for that purpose be sufficiently acquainted with the character of the other witness as to be able to depose to it; and if he answer in the affirmative, he may then be asked, whether the witness whose character is impeached be a person deserving credit upon his oath in a court of justice.

Witnesses may be called to support the credibility of witnesses, either by giving testimony to their general good character, or to their knowledge of the facts in issue, or to their having invariably at other times related the facts stated in their deposition in the same manner.

It is an established rule that a party shall never be permitted to bring general evidence to discredit his own witness. But if a witness proves facts in a cause which make against the party who calls him, the party may adduce other witnesses to disprove his testimony in these particulars.

No witness is obliged to answer any question the answer to which may oblige him to accuse himself of any crime or punishable offence, or to disclose his own turpitude or infamy. But there is no legal objection to a party putting such a question, and the witness's declining to answer it will, in general, be considered as a tacit acknowledgment of the truth of the circumstance stated in the question.

At Courts Martial the deposition of each witness is taken down in writing and the Judge-Advocate is bound to adhere as nearly as possible to the very words of the witness. But this rule does not require (as it has sometimes been insisted upon at Courts Martial) that the Judge-Advocate shall record on the proceedings either nonsense or the inconsistencies or irrelevant answers of a confused or indistinct witness. In such a case it is sufficient that the witness's testimony is taken down in as strict conformity as possible to his real meaning and intention after he has had time to recollect himself and clearly understands the question which has been put to him.

For every witness, whether on his examination in chief or on the cross-examination, has a right to explain and make clear the evidence he has

Except in the case stated in p. 178.

given and at Courts Martial, in order that the witness may have the fullest opportunity for correcting and amending his evidence, the whole of his deposition is read over to him for that purpose before he leaves the witness stand. It can never, therefore, be necessary to take up the time of a Court Martial by recording what the witness would afterwards, on hearing his evidence read over, most undoubtedly request to be struck out of the proceedings.

But this rule is not to be understood to apply to the contradictions into which a witness, who has either concealed the truth or deviated from it, may be led in the course of his cross-examination or on questions put to him by the Judge-Advocate or the Court. These must be recorded for the information of the approving officer, but the witness, although contradictory answers cannot be erased from the proceedings, is at liberty to explain them, and, if possible, to reconcile them to the rest of his evidence.

A practice prevails at Courts Martial of putting a witness on his guard when he is likely to fall into a contradiction, and even of reading over to

* "Every witness, whether on his examination in chief, or on the cross-examination, has a natural right to explain and make clear the evidence which he has given; and if any doubt arises, after his examination has closed, the Court will call upon him for such explanation." M'Nally, p. 388.

himself a preceding deposition. But it must be obvious that this practice entirely defeats the very object and intention of a cross-examination, and that it is admirably adapted to the preventing a detection of any prepared falsehood or concerted story which a witness might wish to impose on the Court. It is at the same time directly contrary to the practice of courts of law. The members of a Court Martial, therefore, ought never to interfere during a witness's examination by the parties, either by refreshing his memory or by suggesting answers to him.

At Courts Martial a witness may, after having left the court and on a subsequent day, request to be re-admitted in order to correct or amend the evidence which he has given.

Although the evidence which is intended more immediately to exculpate a prisoner on his trial is generally confined to the defence, yet if any thing shall drop from a witness during the course of the prosecution or during his cross-examination by the prosecutor that can be in any way conducive to the exculpation of the prisoner, such matter shall be carefully recorded; and in the decision on the merits of the cause it shall without reserve be received and considered as legal evidence in favour of the prisoner.

Courts Martial sometimes permit the prisoner to reserve his cross-examination of the prosecutor's witnesses until he comes on his defence.

But, as Courts Martial are bound to observe the rules relative to evidence and the examination of witnesses which prevail in courts of law, it is not in their power to divest a witness of the character which is ascribed to him by law. If, therefore, a prisoner on his defence calls any one of the prosecutor's witnesses, that witness immediately becomes the prisoner's, and the examination being then in chief, he is not at liberty to put to him such questions as he might have done on cross-examination; at the same time the prosecutor cannot be deprived of his right of cross-examining the witness called by the opposite party, and this would lead to the prosecutor's in reality cross-examining his own witness, in direct opposition to every principle of law.

But although it is irregular for a prisoner on his defence to call any one of the prosecutor's witnesses for the purpose of cross-examining him on the evidence which he gave on the prosecution, he is at full liberty to call any one of these witnesses for the purpose of deposing to points which

* The examination in behalf of the crown being at an end, the prisoner cross-questions the witness if he pleases, or defers it till he is put on his defence." Sullivan's Thoughts on Martial Law, p. 35.

were not studied upon in the prosecution; and in this case the witness becomes in every respect the prisoner's, and is no longer to be considered as a witness of the prosecutor.*

If a member of a Court Martial know any thing of the matter in issue, he may be sworn as a witness, and give his evidence publicly in court; but he is not at liberty to communicate what he may know on the subject in closed court. For a Court, in judging of the innocence or guilt of a prisoner, are by no means to be influenced by any

* These two rules are in conformity to the strict practice of courts of law; but in trials before the House of Lords a prisoner is allowed to reserve his cross-examination of the prosecutor's witnesses until the defence; and Phillips, in his *Law of Evidence*, p. 108., says, that it is reported to have been so ruled at *Nisi Prius*. On a first view this last mode may appear most beneficial to a military prisoner, who, from inexperience, may find much difficulty in entering into an immediate cross-examination of the witnesses on the prosecution. But it would probably be attended with great disadvantages, for, as the Court cannot prevent the cross-examination of the witnesses on the defence, the prosecutor would thus have an opportunity of supplying any omissions which might have taken place in the prosecution, and perhaps of bringing out much additional criminatory matter against the prisoner. This, however, is a consideration more for the prisoner than the Court, and should he wish to reserve his cross-examination of the prosecutor's witnesses until the defence, there would seem to be no impropriety in the Court's permitting it.

report of any member is not given publicly as evidence, because it is neither given on oath, nor liable to be cross-examined into, or refuted by the party whom it may affect.

Handwriting is not admissible as evidence.

SECTION II.

Written Evidence.

EVERY kind of writing, if duly authenticated, is admissible evidence at a Court Martial. But the original must be produced, and no copy, except of official papers, will be admitted unless the Court is satisfied that it was not in the power of the party to produce the original.

It is not necessary that the whole of an original paper should be in the handwriting of the person to whom it is ascribed. His signature is sufficient, nor is it necessary to produce as a witness the person by whom the rest of the paper was written.

The proof required to authenticate any writing is the deposition on oath of the person who wrote it, which is the best evidence, or of one or more witnesses who swear that they are acquainted with the handwriting of the person to whom it is ascribed, and that to the best of their knowledge and belief the writing, or the signature to it, is that person's handwriting.

The witness may be called upon to explain the reasons on which he grounds his belief of its being a particular person's handwriting.

It is an established rule that the similitude of handwritings is not legal evidence.

The writings usually produced at Courts Martial are official documents, such as order-books, account books, morning-report-books, returns, &c. or official letters, and private papers originating in transactions between individuals, such as letters of correspondence, accounts, receipts, &c.

An attested copy of an official document is admissible evidence at a Court Martial; but the person attesting it must be produced as a witness in court in order to depose to its authenticity.

It is, in general, a matter of indifference at Courts Martial whether the original, or an attested copy duly authenticated of an official letter, be produced. But in cases of importance, or where any question arises respecting the contents of the letter, the original ought to be produced if possible.

The original also of all private papers must be produced, unless it be in the possession of the opposite party, or it be proved that it is either lost or destroyed, in which cases an attested copy is admitted, or parol evidence may be given of its contents.

A copy of a copy is not legal evidence.

It will be observed that the practice of Courts Martial with respect to the admission of written evidence, differs materially from the rules of criminal law, according to which it is generally understood that all their proceedings ought to be regulated in consequence of every prosecution being conducted in the name of the king. But this deviation proceeds from necessity, since it would be impossible to assemble a Court Martial were it indispensable that its members should be fully acquainted with what is legal written evidence, a point which is continually occasioning discussions not only amongst the learned in the law, but even among the judges themselves. If, however, these legal niceties and distinctions originate in humanity to the prisoner, or in a desire that the investigation of truth should be conducted on the clearest and most indisputable principles, it will be found that both these objects are equally attained by the plain and simple practice of military law. For on account of the publicity of official documents and letters, and the knowledge which a prisoner must possess of all private papers that can be adduced against him, (which constitute the only written evidence that is in most cases offered at Courts Martial) it is not probable that he can be taken by surprise by the production of any

piece of evidence that he had no reason to suspect; but even if this should happen, he has, in consequence of the daily adjournments of the Court, and the interval granted him for the preparation of his defence, full time to ascertain the nature of such evidence, and, if in his power, to adduce other proof for the purpose of controverting it. Nor with regard to the proper investigation of truth is this practice liable to any objection, as, the fuller the information is on which a judgment is to be founded, the more likely it is that the judgment will be correct; and Courts Martial, on finally deciding on the merits of the case, ought to give no more weight to the written evidence recorded on their proceedings than what it is necessarily and legally entitled to.*

It is, therefore, to be observed that writings, although the best evidence of their own contents, are no evidence whatever of the facts or circumstances stated in them, because they are neither stated on oath nor liable to cross-examination.

* Courts of law are now desirous in most cases that the exceptions to a witness should go to his credibility, and not to his competency; and upon the same principle there can be no valid objection to receiving all papers duly authenticated which tend to prove the charge, and then leaving their credibility, or rather admissibility, to the future consideration of the Court Martial.

all these facts and circumstances must, therefore, be proved by parole evidence.

If, however, a prisoner is charged with having written a mutinous or seditious paper, or a disrespectful letter, such paper or letter is the best evidence which the case admits.

An entry in a morning report-book will be also admitted as proof to fix the date of a soldier's desertion, or a return to fix the number of men connected with any point in issue, or an order to prove that such a particular order was issued. But entries in the account books of paymasters, captains of companies, or commissaries, unless accompanied by the party's receipt or acknowledgment, ought to be received merely as presumptions, and not as direct proof, until corroborated by other evidence in support of the transaction to which they relate.

In the same manner that the verbal confessions or acknowledgments of a prisoner may be given in evidence against him, so may any papers or letters found in his possession, or obtained in any other manner, and proved to be his, which tend to prove either the facts in issue or the prisoner's intention.

Depositions of a witness are admissible in a trial, but they are not evidence of the facts in issue, and cannot be received as evidence of the facts in issue.

unless the witness has died in the interim, or it is proved to the satisfaction of the Court that he cannot be found. But depositions given upon a former trial, or before a magistrate, may be read at a trial, in order to take off the credit of a witness, by shewing a variation in his testimony.

At Courts Martial, however, it is customary on the prisoner making no objection, to receive in evidence the proceedings of a former Court Martial, without again examining the witnesses who were produced before that Court.

If a prosecutor or witness on one trial be afterwards tried on charges connected with the subject of a former trial, his depositions on that occasion may be given in evidence against him on his subsequent trial.

In general, extracts of papers, except of orders or official records which admit not of being removed, are not admissible as evidence; the whole letter or paper, or if an entry in an account book, the book itself, must be produced. But Courts Martial sometimes deviate from this rule, and if they see any necessity admit of extracts being given in evidence.

But it is not necessary to read the whole letter or paper thus given in evidence; and the party producing it may, therefore, read such parts only

as he considers applicable to his case. The opposite party, however, or the Court may require the whole letter or paper, or such parts of it as they think proper, to be read.

Letters and papers need not be read at the very time when they are proved, but may be reserved by the party producing them, and read at any stage of his case.

It is an established rule that, unless satisfactory proof be given of its loss or destruction, parol evidence cannot be received to prove the *contents* of any letter or paper. The letter or paper itself must be produced.* But on a cross-examination a witness's credit may be tried by interrogating him with respect to such contents.

The mere fact, however, of a letter or paper having been written, and the date on which it was written, may be proved by parol evidence.

All written evidence which tends to prove the charge ought to be recorded in its proper place on the proceedings; but such as merely tends to explain or illustrate the evidence, or such parts of the documents or papers given in evidence, as do not immediately relate to the charge, are to be annexed to the proceedings as an appendix.†

* Peake's Law of Evidence, pp. 98, 99.

† It is not necessary to send the original papers, which have been received in evidence, with the proceedings, but

The following are the principal rules in conformity to which any writing, the true meaning of which is disputed, ought to be interpreted.

All writings must be so interpreted, as to exhibit, if possible, a consistent sense; that is, so that one part should not contradict another, nor be unintelligible in itself, or be inconsistent with the nature and circumstances of the subject and facts known to the author, or opinions held by him, or to evident moral or metaphysical truths.

They should be expounded according to the intent of the author, either expressly elsewhere manifested, or, if not, at least naturally suggested by, or necessarily to be inferred from external circumstances.

Where the rules of grammar are not exactly observed, but the sense is intelligible, the writing is not to be rejected.

Where a phrase or sentence is grammatically just, but the sense absurd or unintelligible, we cannot

copies of them should be entered where they are read, or inserted in an appendix, as loose papers are likely to be lost or mislaid, and it should be stated that the papers produced were duly authenticated.

Sir Charles Morgan's remarks in Advertisement to James's edition of *Tristram*, p. 20.

and, consequently, are now obsolete in favour of more

reject some words to make sense of the remaining, but must take them as they are; for there is nothing so absurd and nonsensical but by omitting, and rejecting may be made sense. But nothing is more frequent in all languages, than to supply some words when the sense evidently requires it.

When a phrase is nonsequential, by its repugnancy to something that precedes it, the preceding matter being rational, shall not be rendered void by the repugnancy that follows it.

The surest method of explaining any writing consists in taking the collective sense of the whole; construing one part by another, the doubtful and obscure by the plain and clear.

Hence to form a rational interpretation, regard should be had to the two following rules: if the expressions be dubious, the sense must be derived from the intent; and if the intent be dubious, it must be derived from the express words. If both be dubious, no rational interpretation can be formed; but if both be clear, but adverse to each other, the intent shall prevail.

But if the writer of the letter or paper is himself produced as a witness the explanation which he gives on oath of any doubtful or contested passage must be held to be the true and real meaning and import; unless such explanation is obviously

repugnance to the clear and unambiguous intent of the rest of the paper, or the opposite party can prove that such was not the meaning intended by the witness at the time of writing it.

The admission by the parties on a trial of any fact or circumstance stated in the charge, or of the authenticity of any paper offered in evidence, is perfectly legal, and is to be considered as conclusive proof; for, the only use of evidence being to ascertain the truth of disputed facts, it follows that none is required in support of those allegations which are not denied, and the admission of any thing on the record, or by any other formal act in the course of a cause, not only prevents the necessity of proof but precludes the party making such admission from offering any evidence to the contrary.*

Such admissions greatly shorten a trial, but the Court, of course, will always warn a prisoner to be cautious how he admits any thing which he may have it in his power to disprove.

A question sometimes arises at Courts Martial respecting how far any information, or writing, which is not strictly evidence, can be admitted on their proceedings. On this point, the Judge-Advocate-General at Colonel Quentin's trial, re-

* Peake's Law of Evidence, p. 4.

marked with regard to a letter offered in evidence by the prosecutor, "then the question arises, whether by any mode, consistent with the usual forms of the court, matter can be attached to the proceedings which is not, and cannot be considered as evidence. Now it is clear that the opening of the prosecution, and the speech in reply and the speech in defence, are all attached to the proceedings, though they are none of them evidence. Where an officer, also, on his trial wishes to have his character spoken to by officers of high rank and character, whom he does not bring before the Court, nothing is more common than to introduce their letters in his speech, and they are then attached to the proceedings. I think, therefore, that if Colonel Quentin objects to it, (the letter) that the Court must support his objection; but if Colonel Quentin chooses to waive his objection, all we can say is, that as to precedent it is novel; there is no precedent for it: but I do not know where you are to draw the line; where you are to admit of that which is not evidence to a certain extent, and where you are to exclude the remainder. I think, therefore, the Court, if they see it in the same light as I do, will be of opinion that it must depend upon whether it is acquiesced in by the other party or not; and if it is rejected, to reject it without suffering the least insinuation to arise in their minds against the credit and cha-

nature of the officer who chooses to keep the Court to the strict rules of evidence." *

SECTION III.

Legal Nature and Credibility of Evidence.

EVIDENCE is that which proves or renders credible the very fact or point in issue, and no evidence ought to be admitted to any other point, than that on which the Court are met to decide. †

It is an established rule that the best legal evidence the nature of the case will admit of shall always be produced, if possible to be had; but if

* Page 35.

† That is on the prosecution; on the defence a prisoner is at liberty to bring forward and prove by evidence every fact which, in his opinion, tends either to extenuate his conduct or to refute entirely the charge preferred against him.

It is a general rule, that no evidence which, *ex natura rei*, supposes there is still better evidence in the possession or power of the party shall be admitted; and, therefore, where it appears that any fact or agreement is reduced into writing, no parol evidence of it shall be given, unless it appear that such writing has been lost without any fault in the party, and in this case a copy of such writing, on being the next best evidence of it, shall be admitted; and if no copy were taken, then its contents may be proved by *vivâ voce* testimony. 4 Hawkins, 431.

not possible, then the next best legal evidence that can be had shall be allowed.* For if it be found that there is any better evidence existing than is produced, the very not producing it is a presumption that it would have detected some falsehood that at present is concealed.

Positive proof is always required, where from the nature of the case it appears it might possibly have been had; such as one or more witnesses deposing directly to the facts in issue, or the production of the very letter or paper which the prisoner is accused of having written. But when the nature of the case does not admit of positive proof, then circumstantial evidence, or the doctrine of presumptions, must take place. For when the fact itself cannot be demonstratively evinced, that which comes nearest to the proof of the fact is the proof of such circumstances as either *necessarily* or *usually* attend such a fact; and which may furnish such strong motives of belief of the fact itself as nothing but a positive proof to the contrary can destroy.

* Evidence may be divided into primary and secondary; and the secondary evidence is as accurately defined by the law as the primary. But, in general, the want of better evidence can never justify the admission of hearsay, interested witnesses, or the copies of copies, &c. 3 Blackstone, 367, note.

Presumptions are of three sorts, violent, probable, and light. Violent presumption is often equal to full proof, for there those circumstances appear which necessarily attend the fact; as, if a person be run through the body with a sword in a house, whereof he instantly dies, and a man is seen to come out of that house with a bloody sword, and no other man was at that time in the house. Or as, if the report of a musket were heard, and a person immediately runs to the spot, and finds a soldier with his musket warm and having all the appearance of having been that moment discharged, and at a short distance a man lying killed by a musket ball, and none other present except these two men. Probable presumption, arising from such circumstances as usually attend the fact, has also its due weight; as, if a man was seen to come out of a house where a robbery or murder had just been committed, secretly and in evident alarm and trepidation. But light presumptions are entitled to little or no weight, still any circumstance may be proved from which a fair inference can be drawn, for, though alone it would be too slight to support the finding of the Court, yet it may corroborate other testimony, and a number of such presumptions might become of importance.

It is to be observed that, whenever recourse

must be had to presumptive evidence, the rule of law that no evidence shall be admitted, except to the very facts in issue, necessarily becomes relaxed; and it is then held that circumstances, which have not an immediate and direct tendency to prove the very facts in issue, but which may have an indirect and consequential tendency to that effect, shall be admitted by the Court, provided the party who urges them shall make their consequence apparent.

"One witness (if credible) is sufficient evidence to a Jury of any single fact*, though undoubtedly the concurrence of two or more corroborates the proof; yet our law considers that there are many transactions to which only one person is privy, and therefore does not always demand the testimony of two."† The evidence of one witness, though he may be at the same time the prosecutor, is also

* Except on charges of perjury, where, unless the alleged falsehood were disproved by more than one witness, it would be only one oath against another; and in cases of treason, each overt act is required to be distinctly proved by the oaths of two lawful witnesses, and of one witness at least to each overt act.

† 5 Blackstone, 370. Tytler's remarks on the sufficiency of a single witness are both indistinct and inconsistent, in consequence of his evidently confusing together the English and the Scottish law, which last, in conformity to the civil law, always requires the testimony of two witnesses.

must be had to presumptive evidence, the rule considered at Courts Martial sufficient for the proof of any single fact, and even for the conviction of the prisoner.

But in the 44th clause of the Annual Mutiny Act, and the 3d article, 4th section of the Articles of War, it is declared that two witnesses are required in order to convict an officer of knowingly making false musters, or of signing false muster rolls. This, however, is the only clause of the Mutiny Act or Article of War which prescribes the number of witnesses necessary to be brought before a Court Martial for the conviction of a prisoner.

It is hence obvious that *legal evidence* consists in the deposition on oath of competent witnesses, or the production of duly authenticated papers to the very points in issue, or to such circumstances as may have a consequential tendency to prove these facts. The suppositions, therefore, and inferences which may be formed by the members of a Court Martial in the course of a trial, and the bare assertions of a prosecutor or a prisoner, being destitute of the requisite proof, are not *legal evidence*. Such considerations, consequently, ought to have no influence on the verdict given by the members of a Court Martial who are solemnly bound by their oath to *well and truly try and determine according to their evidence*.

But, though the law has thus established certain rules respecting evidence and witnesses, which every Court is bound to observe; yet the effect which that evidence, when legally given, shall have in fixing the innocence or guilt of a prisoner is left entirely to the judgment and the consciences of the Jury. As, therefore, the members of Courts Martial perform the duty both of Jurors and Judges, a few remarks on the circumstances which confirm or discredit the testimony of witnesses will not perhaps be considered as misplaced.

Evidence does not consist merely in the deposing on oath to facts, but in the proof of facts by witnesses of undoubted credit. If, therefore, testimony be given by a person of respectable rank and situation in life, and of known good character and unimpeached veracity, who is possessed of sufficient power of discernment and discrimination, and who is competently acquainted with the subject attested, and who is neither interested in the cause, nor biassed by friendship to the party calling him, and if this testimony be at the same time clear and consistent, and each circumstance agreeable to common experience, and it be delivered in opposition to the preconceived opinions, prejudices, partiality, or interest of the witness, such evidence is entitled to the highest credit, and the credibility of each witness will be diminished in proportion as he is deficient in any one of these qualifications.

But if testimony be given by a witness who is of known bad character, and notorious for his disregard of veracity, or if the infamy of his character be drawn from himself on cross-examination or proved by other witnesses, and who is incompetently acquainted with the subject attested, and is at the same time deficient in judgment and discernment, and who is interested in the cause, and influenced by resentment, malice, or hatred, and who delivers his testimony under the bias of pre-conceived opinions and prejudices, and who prevaricates and deposes to inconsistencies and improbabilities, such evidence is entitled to no credit whatever, and the credibility of each witness becomes questionable in proportion as any one of these disqualifications can be justly ascribed to him.

An unwilling and reluctant witness, who speaks with caution, answering nothing but what is forced out of him by repeated and circuitous interrogation, is unworthy of the same credit that is given to one who openly and fairly declares all that he knows upon the point. On the other hand, a witness who amplifies in his testimony, unnecessarily enlarging upon circumstances unfavourable to a party, who seems to be gratified by the opportunity of furnishing condemnatory evidence, or manifestly betrays passion and prejudice in the substance of his testimony, or in the manner of delivering it, is to be listened to with equal suspicion of his veracity.

If a witness takes upon him to remember with the greatest minuteness, all the circumstances of transactions long since passed, and which are of a frivolous nature, and not likely to dwell in the memory, his testimony is thereby rendered very suspicious; as, on the other hand, a witness affirming his total want of recollection of the most material and striking circumstances of a recent and remarkable fact, which happened in his own presence, is deserving of very little credit in those particulars which he pretends to remember.

In all such cases, however, the discerning mind of a Juror will be at no loss to separate the truth of an evidence from its falsehood; and where the former reluctantly breaks forth, he will give it the greater credit, as being the testimony of conscience, not only uninfluenced by the passions, but directly against their perverting influence.

Of all proof there is none more equitable than the positive affirmation of witnesses. But, as it is seldom that the deposition of one witness is exactly similar to that of another on the same side, and as the evidence by the prosecutor is often encountered by directly opposite evidence brought forward by the prisoner, it becomes a matter of no little difficulty to form a correct judgment on such variant or contradictory affirmations. It may, however, be laid down as a general rule that all evidence for and against the facts in issue is to be weighed

according to its probability and the credibility of the witness, and that assent must be given to that legal testimony, of whatever nature it may be, which produces the strongest belief.

On this principle, a testimony which is precise and circumstantial, must outweigh that which is less particular or minute and goes only to a general fact; because the former implies more attentive observation or more pointed recollection, and therefore creates a stronger belief.

From the same principle, likewise, it follows, that positive evidence must outweigh that which is negative; for the former being the result of attention and observation of the facts, can never be encountered or disproved by that which may have arisen merely from the want of such attention and observation; thus, supposing two credible witnesses shall depose pointedly to certain words spoken by A., as that he called B. a scoundrel; and two or three others of equal credibility shall swear, that though high words were used, they did not hear that particular expression, the former evidence ought to preponderate over the latter.

If, however, the affirmations of two equally credible witnesses, resulting from an equally attentive observation of the fact attested, be contrary to each other, they destroy each other, and the fact remains

unproved. But if the credibility of the witnesses be unequal, the testimony of the less credible of the two witnesses must still have effect, and as it must therefore detract from the weight which would be otherwise due to the testimony of the most credible of these witnesses, the fact must consequently be considered, if not unproved, at least as doubtful, until it is corroborated by further evidence.

But testimony may be apparently contradictory when it is in reality merely variant, that is, varying in some circumstances, which do not in any respect affect the attestation of the fact itself. For every occurrence admits of three distinct incidents; the substance of the fact, its adjuncts, and its circumstances, which ought to be distinctly considered. For if a variation as to the substance of a fact occur in the testimonies of two equally credible witnesses, it renders the testimony of each of them doubtful, since as the object, if it existed, should have been observed by both, there is as much reason to disbelieve its existence from the omission of the one, as there is to believe it from the affirmation of the other; and they are consequently to be considered as contradictory witnesses. But a variation in the attestation of the adjuncts of a fact does not always invalidate the credibility of a witness as to the substance of the fact, for the completion of an action often requires

a considerable time. One witness may have observed it in its beginning, another in a middle period, and a third towards the end. Yet if the action were instantaneous, and the result notorious, a variation in testifying the adjuncts of a fact would then affect the substance, and if the witnesses were equally credible, render their testimony doubtful. But a variation in the attestation of the circumstances of a fact does not affect the credibility of the witnesses as to the substance of the fact; for their attention being principally directed to the substance, mistakes may arise as to the time, and often even to the place and manner, which are of little importance. For instance, in the relation of a battle by three witnesses, one of them may say that three regiments pursued the enemy five miles; another may say that two regiments pursued the enemy three miles; and the third may say that the enemy were pursued, omitting the number of regiments and miles; here all three agree as to the substance of the fact, viz. the pursuit of the enemy; but they differ as to the adjunct, that is, the number of the regiments that pursued; and as to the circumstance, that is, the number of miles to which the pursuit extended. *

* The substance, adjuncts, and circumstances of a fact are comprehended in this Latin line:

Quis, quid, quot. ubi, quibus auxiliis, cur, quomodo, quando. —

It hence follows, that all variation in the testimonies of witnesses are not to be considered as contradictory and therefore invalidating their credibility; but that the whole of their evidence is to be duly weighed, and if it concur in the attestation of the substance of the fact alleged, that fact is to be held as sufficiently proved. It may also be observed that nothing renders the testimony of a witness more suspicious than its agreeing in every circumstance with that of other witnesses; and that variations in the manner in which the witnesses relate the same occurrence, so long as these variations do not affect the substance of the fact, are strong presumptions in favor of the truth of their testimony, and of its not having been prepared, or concerted together.

SECTION IV.

Examination of Witnesses by the Court.

No point at Courts Martial occasions more frequent discussions and more frequent irregularities, than the examination of witnesses by the Court;

Here *quid*, denotes the substance of the fact; *quis*, *quot*, the agents or adjuncts, and the remainder of the circumstances. See Kirwan's Logic, p. 320. *et seq.*

and yet writers on military law have expressed themselves respecting it in so brief a manner, that their silence altogether would have been productive of less error. There can be no doubt that the members of a Court Martial, both as judges and jurors, may put such questions to the witnesses, as they think necessary to enable them to form their opinions conscientiously on the merits of the case. But this right must have limits, or confusion in every proceeding must be the inevitable consequence, were such a number of members at liberty to ask every question which to each individual, or even the majority of the Court, might seem conducive to the proper investigation of the charge. An unlimited right of this kind * can never be productive of inconvenience in courts of law, for the discretion and legal experience of the

* The following official opinion was given by the Advocate-General of Bombay. "A judge or juror may at any time examine into any matter which is the subject of trial, or which may be so connected with it as to form circumstantial evidence, whether either of the parties has or has not examined as to that matter; and I am of opinion that a Court Martial ought to act on the same principle.

"Whenever any new matter arises in evidence in the course of an examination, the party affected by such matter is always at liberty to cross-examine, or adduce contradictory testimony to such matter, though such matter should arise out of the examination of the Court or the Jury, and I think the same practice ought to be followed by Courts Martial."

Judge will always prevent its being employed improperly, But what hope is there that officers, acquainted but slightly if at all with the proper mode of legal investigation, may not, unless they be restricted by certain limitations, employ this right to the hinderance rather than to the furtherance of justice. The safest and surest preventive, it may be said, is a majority of the Court, but can a majority possessing knowledge and experience be always expected; and is not the majority sometimes influenced by the opinion, perhaps an erroneous one, of an individual? I must at the same time admit that no legal restriction exists, and that, therefore, the extent to which this right is to be exercised at Courts Martial must depend on the sound discretion of the Court alone. A few remarks, however, on this point may not perhaps be undeserving of attention.

The members of a Court Martial ought to recollect that they have been duly sworn to administer justice without partiality, favour, or affection, and that consequently the putting any question which has a tendency to assist either the prosecutor or the prisoner cannot be consistent with the oath which they have taken. It must, also, be obvious that, as the members are supposed to meet unacquainted with the facts which they are to investigate, the only questions that can well originate

with them are such as may be requisite for the explanation or fuller developement of what has been already given in evidence. It cannot be the duty of the Court to assist the prosecutor, by enquiring into matters which may, in their opinion, more fully establish the truth of the charges, but which the prosecutor has not given in evidence. For such omissions are favorable to a prisoner, and no circumstance which appears in his favor ought a judge to suppress or attempt to invalidate. Still less can it be proper or necessary on the defence for the Court to enquire into matters not brought forward by the prisoner. For here the Court, ignorant of the grounds on which the prisoner may rest his justification, would be more likely to injure than to benefit his cause. Seldom is a person brought to trial who is entirely innocent, and it cannot be expected that a Member can at once discern the nice shades between a prisoner's innocence and guilt; or at once ascertain the particular parts of the charge which the prisoner may have it in his power to extenuate or refute.

But Tytler has given it as his opinion, that on the prosecution "the Court put any questions that they may think proper in explanation of what has been already sworn, or in *further proof of the articles of charges*;" and that on the defence "the

Court put all questions to the witnesses that appear to them proper for bringing out the truth." In the same manner Commanders in Chief have sometimes, on confirming the sentences of General Courts Martial, declared in general orders, that it was the bounden duty of Courts Martial to investigate fully the charges submitted to them, and to obtain every information on the subject of the trial which could be supported by evidence. In conformity, therefore, to these opinions it may be argued that a Court Martial, notwithstanding such a mode of proceeding may assist the prosecutor and injure the prisoner, are bound to supply, as far as may be in their power, every deficiency that may occur in the prosecution, in order that the charges may be fully investigated; and such, indeed, is the real purport of the arguments which are often urged at Courts Martial. But it cannot be denied that the consequence of acting in this manner must inevitably be, that the prisoner, contrary to every principle of equity, will be liable to be prosecuted not by one individual only, but by fourteen or sixteen different persons. It cannot, also, be denied that the words of the oath, without partiality, favour, or affection, must at the same time become a dead letter, because it is morally impossible that the Members can advocate one side of the cause without being in some degree biassed against the other: and that so far from

being counsel for the prisoner on the defence, as every judge ought to be, they will be naturally and irresistibly led to give more weight to such evidence as may appear in favour of the prosecution, in which they first interested themselves, than to such as tends to support the defence. If these circumstances, therefore, be, as I think, the inevitable consequences which must result from these opinions, if understood to the full extent that the words admit, it may be reasonably concluded that they never were intended to convey so extensive a meaning, or to impose on the Members of Courts Martial the duty of prosecutors, instead of that of impartial jurors and judges. * A conclusion which is strongly supported by the words of the obligation under which they act in both of these capacities; for as judges they are bound to duly administer justice, and as jurors to try and determine according to their evidence in the matter before them, and although it is not specifically declared by whom this evidence is to be produced, yet, as it is the practice of every other court of

* It may be said that the words of Tytler do not fairly admit the construction which I put on them. But it is not necessary to enter into this question, as in the text I argue merely on the sense which is generally ascribed to them by members of Courts Martial; and whatever be their real meaning it must be admitted that they are very deficient in distinctness and precision;

justice that all evidence shall originate with the parties on the trial, a Court Martial cannot with propriety pursue a different practice.

But if these remarks be correct, it will follow that it is not the duty of Courts Martial to search for further proof of the articles of the charge, or to enquire into matters not brought before them by the parties on the trial; nor, as the Members almost always meet entirely unacquainted with the particulars of the charge about to be investigated, is it very intelligible in what manner they could ever perform this duty, were it actually incumbent on them. It is therefore the duty only of the prosecutor or prisoner to lay before the Court such evidence as they may think will best support their respective cases; and although the Court as judges may with propriety point out to either party the insufficiency of his proof, and recommend him to produce better, still they cannot correctly take the case out of the party's hands either by calling witnesses whom he never cited, or by putting questions on points which he never brought before them. Members of Courts Martial, however, too frequently do not advert to their being ignorant of how far a witness can depose to the facts in issue, which can be fully known to the party only who calls him; and are apt to forget what ought to be the real object of every question

which is proposed. Hence it arises that the examination of witnesses by a Court Martial, in general, leads to much extraneous and irrelevant matter, which protracts the proceedings without conducing to the proper investigation of the charges. It may, indeed, be said that in most cases where Courts Martial put numerous questions, their examination, either on the prosecution or defence, is actually a severe cross-examination of the prosecutor and his witnesses, wherein every question is put which can tend to invalidate the prosecution. But if members would reflect for a moment, and seriously consider what is the real duty of judges and jurors as exemplified in courts of law, or if they would merely advert to the words of the obligation under which they act, they would be convinced that the advocating the cause of either party cannot be consistent with an impartial discharge of their duty. And with regard to the prisoner it has been justly observed, that the maxim that the judge is counsel for the prisoner signifies nothing more than that the judge shall take care that the prisoner does not suffer from the want of counsel. The judge is counsel only for public justice, and to promote that object alone all his enquiries and attention ought to be directed."*

* 4 Blackstone, 355, note.

It seems, therefore, evident that Courts Martial are not bound by any duty whatever to put questions to the witnesses for the purpose of bringing out the truth, or of more fully investigating the charges; but that, on the contrary, the principles of equity and justice are liable to be infringed, and the proceedings unnecessarily protracted, whenever any questions which they may put are not restricted to the explanation or fuller development of the evidence which has been previously given to the very points in issue. Courts Martial ought also to recollect, that if from their examination any new matter (that is, any matter not enquired into by the parties) arises in evidence, the party affected by it cannot be legally refused the liberty of cross-examining into or adducing contradictory testimony to such matter; and that consequently, whenever questions of this nature are put, the attention of the Court must be diverted from the real object of investigation, and that confusion must hence take place in the trial, and the proceedings be protracted to an indefinite length. A consideration which ought of itself alone to be sufficient for preventing Courts Martial entering into the very irrelevant and improper examination of witnesses in which they sometimes indulge.

A question has arisen respecting whether or not Courts Martial have a right, *of their own motion*,

to summon any witness whom they may think necessary for the proof of the charge. It is at the same time admitted, and it is in fact the general practice of Courts Martial, that should it appear from the depositions of the witnesses examined that some part of the evidence wanted further proof or elucidation, and that a person, mentioned in these depositions as capable of affording the information required, was in attendance or immediately procurable, the Court may undoubtedly call that person as a witness, whether adduced by either of the parties or not. * But whether or not Courts Martial have a right to order evidence to be brought forward, of which no mention was made in the course of the proceedings, is a point that still remains in dispute. † If, however, the

* It is at the same time to be observed that even in this case Courts Martial should summon such a witness, if in support of the prosecution, previous to the prisoner's entering on his defence. For no prisoner ought to be obliged to disclose his defence until he knows all that he has to answer to. If, in support of the defence, he ought equally to be called before the prosecutor enters on his reply.

† On referring to Major Drinkwater's letter on this subject, and Sir Charles Morgan's reply, in M'Arthur, vol. 2. p. 362, it will be observed that the latter is no answer to the former. Major Drinkwater asks, Has the Court a right to order evidence to be brought forward, of which no mention has been made in the course of the prosecution? Sir Charles Morgan replies, I think the Court may exercise their discre-

preceding remarks be correct, and it be not the duty of Courts Martial to advocate the cause of either party, or to supply the deficiencies that may occur in the proof adduced either in support or refutation of the charge, it must necessarily follow that the Court cannot, from their own knowledge of the circumstances of the case, call any witnesses who have not been cited by the prosecutor or prisoner.

Each member of a Court Martial is allowed to propose questions, but, such questions must be submitted in the first instance to the president, who, if he approve them, hands them over to the Judge-Advocate for the purpose of being put to the witnesses. If the president should think a question unnecessary, and the member proposing it still insists on its being put, the Court must be closed, and the opinion of the members taken whether or not the question shall be put; and if the majority agree that the question is proper, it

tion in calling any witness before them from whom they have reason to think the truth may be obtained, whether adduced by the prosecutor or not. But he does not give an opinion on the particular point referred to him, that is, whether or not the name of this witness must have first appeared in evidence on the trial, or whether the Court may summon him merely from their own knowledge of the circumstances of the case.

is accordingly put to the witness, on the Court being again opened. It is also to be observed, that while the trial is proceeding, and most particularly when a witness is under examination, no member ought to speak, in order that a dignified silence may be preserved in Court, and no interruption given to the proceedings. Should a member then wish any subject to be discussed, he ought to state his request in writing to the president, and likewise the cause of it, upon which the president, if necessary, will direct the Court to be closed.

CHAP. IX.

FINDING AND SENTENCE.

SECTION I. *Finding.*II. *Sentence.*

SECTION I.

Finding.

WHEN the prosecutor and prisoner have laid their respective cases before the Court, the trial is finished, and the parties and witnesses are dismissed. The Court is then closed *, and the Judge-Advocate proceeds to take the opinions of the members on the evidence in the matter before them, by putting this question to each individual, commencing with the junior member: "From the evidence given for and against the prisoner, and from what he has said in his defence, are you of opinion that he is guilty or not guilty of the charge preferred against him?" and as they declare their opinions he writes them down severally on a sheet of paper.

* Previous to deliberating on the finding, the fair copy of the proceedings is sometimes read over, or merely the evidence, and sometimes neither, if the Court think a further consideration of the subject unnecessary.

It is in general a matter of no little difficulty to ascertain what is the verdict of a Court Martial. For as Courts Martial are bound to exhaust the whole charges that come before them by expressly acquitting or convicting the prisoner of each allegation that is contained in them, and as charges drawn up by private prosecutors are in general inaccurate and indistinct, a variety of opinions necessarily arises among so many members, respecting how far the evidence applies to each particular point, and respecting the exact degree of culpability of which the prisoner is to be found guilty. Did indeed, "the president and members of the Court (as recommended by Tytler) reason and deliberate separately on each charge, candidly discussing in a free and open conversation, the import of the evidence, and allowing its full weight to every argument or presumption in favor of the prisoner,"* it would contribute greatly both to the unanimity and correctness of the verdict. But

* But in what manner does this agree with the following remarks of the same author in p. 155. of his work? "All the members of the Court have their unbiassed judicative power; and even the influence of opinion is guarded against as far as possible, by the order in which the votes and opinions of the members are given." Could the influence of opinion possibly exert itself more than in a free and open discussion? But this is not the only instance of inconsistency which is met with in this author, and which perplexes and sometimes misleads his readers.

Courts Martial are averse to such discussions, as they think that they must tend to bias and influence the opinions of the members, and thus render their votes not the conscientious dictates of their own judgments. This, however, is refining too much; and so far from there being any impropriety in such discussions, they would, on the contrary, materially assist in the due administration of justice, by affording an opportunity for the judgment of the senior and more experienced members to correct the hasty impressions or erroneous opinions of those who were younger and less experienced.

But it is principally to mistaken ideas, arising from the words "according to your consciences," contained in the oath administered to them, that the discrepancy in the votes of members of Courts Martial must be ascribed. For they will not too frequently consider that these words apply merely to cases of doubt, and that no doubt can or ought to exist with respect to points which are established either by the custom of war or by the law of the land. Some may, it is true, be unacquainted with the proper mode of proceeding, and may therefore correctly, as far as regards their own case, suppose that to be doubtful which is on the contrary clear and determined. But they ought to recollect that "the duties attached to officers employed on

Courts Martial are of the most important nature, and in order to discharge them with justice and propriety, it is incumbent on all officers to apply themselves diligently to the acquirement of a competent knowledge of military law, and to make themselves perfectly acquainted with all orders and regulations, and with the practice of military courts." * It must also be evident that where the law prescribes a specific mode of acting, no member of a Court Martial can excuse a deviation from it, by pleading that he merely acted according to the dictates of his conscience. But what obligation can be more peremptory than the words of the oath taken by each member of a Court Martial, that he will try and determine according to his evidence in the matter before him. The weighing, indeed, of this evidence is certainly left to his conscience and judgment; yet even in performing this part of his duty he is bound by certain rules, and he cannot make that evidence which is not evidence; for if he gives a verdict contrary to what is held by law to be evidence, he is liable to be punished for having acted illegally. Members of Courts Martial, therefore, in deciding on the innocence or guilt of a prisoner, ought to dismiss from their minds every impression and bias,

* General Regulations and Orders for His Majesty's Army, p. 185.

whether favourable to the prosecutor or the prisoner, and to direct their attention solely to the evidence recorded on their proceedings; and after having deliberately considered it, conscientiously discharge their duty by giving a verdict on that side on which it preponderates.

A doubt may, however, occur whether, when the facts alleged, are proved but do not amount in its opinion to the offence charged, it is competent for the Court to give a general verdict of "not guilty." But in deciding on the innocence or guilt of a prisoner the members of a Court Martial act as jurors; and Blackstone has observed that "they (the jury) have an unquestionable right of determining upon all the circumstances [the fact and the law], and finding a general verdict, if they think proper so to hazard a breach of their oaths." * But such a verdict may be set aside by the judge; and formerly the jury were liable to be punished for giving it. The expression, therefore, of Blackstone is singular, as it is equivalent to saying that jurors *have a right* to commit perjury; and to incur the penalty prescribed for such a breach of their oaths. It may, consequently, be concluded that in all cases where

* 4 Blackstone, 360. The maxim of law on this point, *de jure respondent judices, de facto jurati*, is too clear and explicit to render any further remark necessary.

the facts charged are substantiated by sufficient proof, a Court Martial is bound to find the prisoner guilty; and in giving this verdict it must be recollected that, according to the rules of law, of practice, and of common sense, it means nothing more than guilty, if the fact, with which the prisoner is charged, be sufficiently stated, and is an offence in the eye of the law.

But when the facts alleged in the charge are thus found proved, it still remains for the Court as judges to decide, from all the circumstances of the case, on the exact degree of culpability which shall be ascribed to these facts. For should it appear that the prisoner is not guilty to the full extent charged, it is competent for the Court to acquit him of that particular degree of guilt, and to find him guilty in an inferior degree only. But though this rule ought to be followed where the offence proved admits of different lesser degrees of criminality, it will not authorize the Court to find the prisoner guilty in a higher degree than is alleged in the charge, nor of another separate and distinct offence. For the Court are not warranted to go beyond the charge; nor did the prisoner defend himself against either a different crime or a higher degree of guilt than was contained in the charge. If, therefore, evidence should arise in the course of the trial, of greater

criminality against the prisoner, or of his guilt of another crime, it is competent for the Court, after deciding on the charge before them, to report their opinion to the officer by whose warrant the Court is held, and to recommit the prisoner to confinement in order that he may be brought to trial.

But it is to be observed that there is only one military offence which admits of a Court expressly acquitting a prisoner of the precise crime laid to his charge, and of finding him guilty of another of less magnitude, but of the same species or nature. That is, desertion, where the proof may amount to no more than absence without leave. In which case the Court ought to acquit the prisoner of desertion, and to find him guilty of the inferior offence only, absence without leave.* In no other case is there any crime specified in the Articles of War which will admit of being thus divided into offences of a greater or less magnitude.† If, how-

* The distinction between these two offences consists in the intention. For several causes may occasion a soldier to be absent without leave from his regiment without his having any intention of deserting.

† The finding of the Court Martial in serjeant Grant's case, mentioned in Tytler, p. 528., was certainly erroneous. For the charge was, in the express words of the 6th. article, 7th section of the Articles of War, for advising and persuading two drummers to desert from His Majesty's service: and

ever, a soldier be accused of irregular or unsoldierlike conduct, or neglect of duty, though these offences admit not of division, the Court may certainly declare by their verdict that they find the prisoner guilty in a slight degree only. For there are many gradations in guilt; and although the law has not declared each gradation to be a distinct offence, it is still incumbent on a Court Martial, who act both as judges and jurors, to give due weight to every circumstance which may appear in favor of a prisoner; and even when they cannot acquit him of the facts charged, to diminish, as far as their evidence will permit, the culpability which is attributable to these facts.* But with

it must be evident that it is not possible to divide this crime into offences of greater or less magnitude. In order, therefore, to have convicted the prisoner of this offence, it was indispensable that it should have been fully proved that he advised and persuaded the desertion; and if proof to this extent were not given, the prisoner ought undoubtedly to have been acquitted.

* That these remarks are in conformity to the mutiny act will be evident; as it cannot be supposed that the legislature would have assigned a capital, or inferior punishment at the discretion of a Court Martial, for the same identical offence, unless they had been of opinion that this offence admitted of various degrees of culpability. But it is not easy to understand how there can be any gradations of guilt in mutiny, or in betraying a garrison to the enemy, or in any other act, except desertion, specified in the first clause of the mutiny

regard to charges preferred against officers, as these are seldom drawn up in the precise words of any Article of War, the Court may find the prisoner guilty of any part of them which they think is proved, and acquit him of the rest. For instance, if an officer be charged with highly disgraceful conduct unbecoming an officer and a gentleman, the Court may acquit him of the most serious part, and find him guilty of unbecoming conduct only. Or, if an officer be accused of tyranny and oppression, the Court may find him guilty of slightly oppressive conduct only. But if an officer be arraigned on a charge framed according to the 30th article of the 16th section of the Articles of War, as *the behaving in a scandalous infamous manner, such as is unbecoming the character of an officer and a gentleman*, forms but a single offence, which evidently admits not of being divided into offences of a greater or less magni-

act. There may certainly be extenuating circumstances in a case, but however these may palliate the conduct of an offender, they can in no manner whatever divest the offence of its specific character. If a soldier, for instance, on parade, on being struck or abused in a gross manner by his officer, knock his officer down; that act, however the provocation may palliate it, is still mutiny. Or if a soldier, after the fatigue of a long and harassing march, be found sleeping on his post, the offence, it is evident, cannot admit of a lesser degree of culpability, although it may of extenuation.

tude, the Court must consequently either acquit or convict the prisoner of the whole charge. It is not competent for them to find him guilty of a part of this charge, and to acquit him of the rest.

In deciding on the guilt of a prisoner accused of a civil crime, it is necessary to take into consideration the law respecting principals and accessories. But this is not requisite at Courts Martial, as the few cases in which military offences admit of accessories, are specified in the Articles of War, and therefore form separate and distinct offences. But in consequence of this distinction a difficulty arises; for, suppose that a soldier is charged with mutiny, and that in the course of the trial it is proved that he neither excited, caused, nor joined in the mutiny; but that he was present at the mutiny, and did not use his utmost endeavors to suppress the same; or that he knew of the intended mutiny, and did not give information thereof, can the prisoner in this case be acquitted of mutiny, and found guilty of not doing his utmost to suppress or of concealing the same? In the Annual Mutiny Act these acts are all joined together, and the penalty of committing them is also the same; death or such other punishment as by a General Court Martial shall be awarded. It might hence be inferred that the legislature did intend that these acts should be considered either

as the same crimes or the same kind of crimes. But the acts are in themselves of so very distinct a nature, and require so different a defence on the part of the prisoner, that the justness of this inference may be reasonably doubted. For a prisoner charged with mutiny is certainly not required to adduce any further exculpatory evidence than to prove that he neither excited, caused, or joined in the mutiny; and although in the course of this proof it may appear that he either knew of the intended mutiny without giving information thereof; or being present at it, did not do his utmost to suppress the same; still, not being called upon to defend himself for these acts, he may neither think it necessary, nor have an opportunity of proving, that in neither of these cases could any blame be justly imputed to him. It will hence follow, that should the Court acquit him of mutiny, and find him guilty of concealing, or not doing his utmost to suppress the same, they would actually condemn the prisoner without a trial, and without hearing what he might have to urge in his defence. There seems, however, to be no difficulty with regard to the other few cases of accessories to military offences, as they are of so distinct a nature that they never can emerge in the course of a trial for the principal offence, and as they must always be well known to the officer preferring the

charge. The cases are, desertion*, misbehaviour before the enemy, abandoning posts†, and challenges‡, and, as they must always constitute distinct offences, the delinquent is consequently tried as a principal and not as an accessory. In the same manner every officer or soldier, who aids and abets another in the commission of a military crime, or conceals it after being committed, or assists the criminal in escaping from punishment, is guilty of a positive offence to the prejudice of good order and military discipline, and may therefore be tried as a principal but not as an accessory, and punished at the discretion of a Court Martial. In all cases, therefore, of trials for offences purely military, it is entirely unnecessary for Courts Martial to advert to the distinctions between principal and accessory which are established by law, since the prisoner is, under every circumstance, to be considered as a principal.

It is particularly to be observed, that should any extenuating circumstances in favor of the prisoner appear in evidence, which ought to be taken into consideration by the Court, these circumstances ought to influence the finding, and not the sentence of the Court. For, whenever a deviation

* Articles of War, 6th section, 2d and 7th article.

† Ibid. 14th section, 21st article.

‡ Ibid. 7th section, 3d article.

from this simple rule takes place, the punishment awarded becomes inadequate to the degree of guilt of which the Court themselves declare that the prisoner is culpable; and hence proceeds, to the great prejudice of discipline, such sentences, as the awarding corporal punishment against a soldier found guilty of mutiny in having struck his officer while in the execution of his duty, and six months reduction of rank against an officer found guilty of acting in a manner unbecoming an officer and a gentleman, in having allowed himself to be struck without taking any steps to vindicate his honor and character. In such cases it is to be supposed that there is some error in the manner in which the finding of the Court is expressed, and that it was not their intention to have found the prisoner guilty to so great an extent. But the real opinion of the Court being unknown, a judgment can be formed on their public sentence only, and nothing can contribute more to render military law vague and uncertain than such striking discordancies between the finding and sentences of Courts Martial. They are, at the same time, perfectly unnecessary, as the opinion of the Court may be either general in its tenor, that is, declaring the prisoner guilty or not guilty of the whole charge; or it may be special, finding certain facts proved or not proved. For in all cases, the guilt or innocence of the prisoner with respect to each particular

allegation contained in the charge must be pointedly found and declared, otherwise the members do not discharge the whole of their duty, which requires that they should decide whether all and each of the facts alleged are proved or not proved. But it is, also, the duty of the Court to determine the exact degree of culpability which attaches to each fact; and it is therefore competent for them to declare that the acts charged and found proved proceeded from an error of judgment on the part of the prisoner, or that under all the circumstances of the case the Court do not ascribe any criminality to the prisoner for the commission of these acts. *

Such being the power of Courts Martial, it must be evident that the punishment awarded ought never to be at variance with that degree of culpability of which a prisoner is found guilty. For the Court ought in the first instance to consider deliberately the nature of the crime proved, in order to ascertain whether it admits of being described as an offence of less magnitude than the one alleged in the charge, and if not, then to weigh

* In such a case, to prevent a seeming inconsistency, the word "guilty" need not be used in the finding: in which it is sufficient to declare that the Court find the allegations charged proved, but on account of such and such circumstances attach no blame to the prisoner's conduct.

carefully the evidence recorded, in order to ascertain whether any circumstances have appeared in evidence, such as the offence being unintentional or occasioned by an error of judgment, which ought to absolve the prisoner from all or the principal part of the culpability of which he is accused. By acting in this manner the members will have an opportunity of giving full weight to every extenuating circumstance which may have appeared in favour of the prisoner, and, by thus specifically declaring in their verdict the precise degree of guilt of which they find him culpable, they will never be obliged to award a punishment altogether inadequate to their own finding. But if the facts charged be fully proved, and the guilt which necessarily attaches to them admits not of being lessened or excused, whatever extenuating circumstances in favor of a prisoner may arise in the course of the trial, they ought not to have the slightest influence either on the finding or on the sentence of the Court; they must be reserved for the consideration of the approving officer; and the Court can avail themselves of such circumstances in no other way than as proper and sufficient grounds for recommending the prisoner to mercy.

I am not aware that there are any causes independent of his innocence which shall occasion the acquittal of a prisoner at a Court Martial. For

should he prove, in his defence, that his true name is not the one inserted in the charge, still his having taken no advantage of this defect on his arraignment, shall preclude him from alleging the misnomer as a bar to his conviction. I have also had occasion to mention in a former place *, that, though it be proved that the facts charged happened on a different date or at a different place than the one specified in the charge, such a mistake is immaterial, and should the facts be otherwise brought home to the prisoner he must be found guilty. If, however, the date should in any case form a constituent part of the fact, as, for instance, a prisoner is charged with having written a disrespectful letter to his commanding officer on the 26th, and the letter produced in support of the charge is found to be dated on the 27th of the month, a mistake in the date being then a variance in fact, and not in the time only, must prove fatal to the charge, and the prisoner must in consequence be acquitted: or, should it appear in the course of a trial that the offence charged took place subsequent to the date of the charge, (if such a mistake could occur) the prisoner must in like manner be acquitted. But in either of these cases the prisoner may be tried again on another charge, wherein the offence is set forth on the true date on which it actually occurred.

There are, however, two pleas which will sometimes be urged by a prisoner, intoxication and insanity, that require to be adverted to. With regard to the first, the law is clear and precise; for Blackstone observes, "That as to artificial voluntary-contracted madness by drunkenness or intoxication, which depriving men of their reason put them in a temporary frenzy, our law looks upon this as an aggravation of the offence, rather than as an excuse for any criminal misbehaviour."*

But if an officer or soldier, who is neither on duty nor warned for duty, should become intoxicated, and in that situation be betrayed into the commission of an offence, it seems harsh to decide that this momentary forgetfulness of himself should be considered as an aggravation and not an extenuation of the offence. In such cases, however, it would certainly be most conducive to the maintenance of discipline and propriety of conduct, that the Court should award a punishment adequate to the exact degree of guilt of which the prisoner may be found culpable, and merely to avail itself of the intoxication as a sufficient ground for recommending his case to the favourable consideration of the commander in chief.

The law, also, with respect to lunacy is equally precise; for in criminal cases lunatics are not

* 4 Blackstone, p. 25.

chargeable for their own acts if committed when under that incapacity; and "if a man in sound memory commits an offence, and before arraignment for it he becomes mad, he ought not to be arraigned for it; and if after he has pleaded, he ought not to be tried for it; and if after he be tried and found guilty, he loses his senses before judgment, judgment shall not be pronounced." * But it is at the same time held, that "if there be a total permanent want of reason it will acquit the prisoner; if there be a total temporary want of it, when the offence was committed, it will acquit the prisoner; but if there be only a partial degree of insanity mixed with a partial degree of reason; not a full and complete use of reason, but a competent use of it sufficient to have restrained those passions which produced the crime; if there be thought and design, a faculty to distinguish the nature of actions, to discern the difference between moral good and evil, then, upon the fact of the offence proved, the judgment of the law must take place. † It is, also, to be remarked that in all cases when a prisoner is acquitted on account of insanity, a Court Martial must find specially that he was insane when he committed the offence charged, and must declare in their finding that he is acquitted on that account.

* 4 Blackstone, p. 24. † 19 State Trials, pp. 497, 498.

If the Court, after having duly considered every circumstance of the case, are of opinion that the prisoner is not guilty of the charge preferred against him, he is then for ever quit and discharged of the accusation. But the manner in which this acquittal is expressed at Courts Martial varies very considerably, and may be divided into eight distinct formulas, each of them conveying a less or more favourable judgment on the innocence and conduct of the prisoner. For the Court may find that the charge is not proved, and therefore acquit the prisoner; an acquittal which must always leave his innocence very questionable, as it shews that the Court themselves were not convinced that he was really innocent: or the Court may simply acquit him, which is still not altogether satisfactory, on account of Courts Martial having been too much in the habit of using a stronger formula. But the other six formulas are all of them expressive of the Court being satisfied that the prisoner is not only innocent of the specific charges preferred against him, but likewise of all impropriety of conduct in any circumstance connected with them; as they may acquit him either fully, or most fully; or honourably, or most honourably; or fully and honourably, or most fully and most honourably. It ought, however, to be observed that the word honourably should never be used except in acquitting a prisoner of charges in which

his honour was implicated. For there are many offences that an officer may unfortunately commit, which, although to the prejudice of military discipline, affect not in the slightest degree either his honour or his character as a gentleman. It is therefore perfectly unnecessary and even improper, for a Court to acquit a prisoner either expressly or by implication of a higher degree of guilt than that of which he was accused.

It is also competent for the Court on acquitting the prisoner to declare their opinion on the conduct of the prosecutor and on the nature of the charge, a measure which a Court Martial ought always to adopt when the conduct of the prosecutor is deserving of censure; as it is not only a satisfaction due to the prisoner, but as it may often prevent the necessity of another trial. Courts Martial, therefore, may declare the charge to be frivolous, vexatious, unwarranted, unfounded, or malicious; and that the prosecutor in preferring it was actuated by private pique and resentment, and not by any motives for the good of the public service. They may also give their opinion on any incidental circumstances, though they do not form part of the charge which have arisen in the course of the trial, implicating the conduct of the prosecutor or prisoner, or even of a third person. But this right ought to be exercised in the soundest dis-

cretion, and Courts Martial ought never to avail themselves of it in order to make improper or irrelevant remarks.

Courts Martial may also observe upon and censure any inconsistencies or prevarications of which a witness may be guilty. In justice, however, this power ought to be exercised with regard to military persons only, who, if the Court have expressed an erroneous opinion, can obtain immediate redress by applying to the Commander in Chief. But persons in a civil capacity may, without being aware of such a censure having been passed, find their character materially injured; and even, if they were aware of it, they could obtain no redress except by an inconvenient process at law. For there can be no doubt but that, as the Court would in such a case assume powers which are not legally vested in it, every individual member would be liable to an action for defamation on the part of the persons so censured.

SECTION II.

Sentence.

BUT should the Court find that the prisoner is guilty, the Judge-Advocate then proceeds to take

their opinions on the punishment to be awarded, by putting to each member, commencing with the youngest, this question — “The ~~Court~~ having found the prisoner guilty of such an offence, in your opinion, what punishment ought to be awarded?” — and every member must give his vote whether he has acquitted or condemned the prisoner. Such is the established practice of Courts Martial held in the army of India, and I believe, of all Courts Martial held in His Majesty’s army, except of such as are assembled at the Horse Guards.

On this point, however, the most singular opinions are held by writers on military law. Adye, Sullivan, and M^rArthur lay it down as a rule that those members who acquit the prisoner, should he be found guilty by the majority, are not to vote on the punishment which must in consequence be awarded. Tytler opposes this opinion, but advances a still more extraordinary one, that the members who acquit are to vote, in order that they may contribute to render the punishment as mild as possible; and Sir Charles Morgan states, that “it is the practice at the Horse Guards not to require a vote from the members who acquit a prisoner when the question of punishment is proposed. For it seems incongruous that one, who thinks the prisoner not guilty, should give a voice

for the inflicting any punishment; but the number of members who have acquitted him are always counted in favour of the prisoner, and thrown into the scale with those who vote for the mildest punishment."* But on what reasons or principles these opinions are founded it is impossible to imagine. For it is universally admitted that the decision of the majority shall bind the minority; and in every judgment given during the proceedings, however it may affect the parties, and even in finding the guilt or innocence of the prisoner, it is the decision of the majority alone which prevails. On what grounds, therefore, can it be with any justice maintained that the opinion of the majority who find the prisoner guilty shall, in the case of punishment alone, lose its usual power and effect, and no longer bind the minority; or that the verdict, after it is once found, shall not, as in all other instances, be considered the act and opinion of the whole Court? But the only reasons which are given by these writers are, that it would be incongruous, that it cannot be supposed that the members who acquit a prisoner should assign him any punishment. It is thus that when about to discharge the most important part of their duty, officers, solemnly sworn to duly administer justice, are to disregard their oath, and, from the dictates

* Advertisement to James's edition of Tytler, p. xii.

of their private feelings, to abstain from the most essential act of justice; the proportioning of punishment to the guilt proved. The mere stating of such a proposition is sufficient to expose its fallacy. It may, therefore, be justly held that the *minority* are as much bound by the verdict of the *majority*, when they find the prisoner guilty, as when they find him not guilty; and that in the former as well as in the latter case the verdict, when once found, must be considered as the act and opinion of the whole Court, and that in every further proceeding which may take place, the minority must act in conformity to that opinion. Hence it is that the Judge Advocate puts the question respecting the punishment to be awarded, not to the majority alone but to all the members, since from the moment that the finding is recorded the right of individual judgment ceases, and the *minority* and *majority* no longer exist, as they are absorbed in that opinion which is alone the legal voice of the Court.

It seems, also, to be well deserving of the consideration of any officer who might be inclined to regulate his conduct by such respectable authorities; how far the sentence of a majority only, consisting of less than the president and twelve members, is strictly legal. For it is held in law that if any judgment whatever be given by persons who had

no good commission to proceed against the person condemned, it is void. * But the legislature has positively enacted that a Court Martial shall consist of not less than thirteen members, and all powers and authorities are solely vested in a Court so constituted. If then nine members take upon themselves to award a punishment in which the other four members neither concur nor vote, that majority assume a power which is not legally vested in them, and their act is consequently null and void; nor will it be disputed, that had these four members not attended the Court, any act of the other nine members during their absence, would have been altogether illegal. Can then their mere presence, if they do not exercise their judicative power but transfer it to others, give effect and legality to any decision of a less number of members than that of which the Court ought by law to be constituted?

But the singular consequences which must flow from these opinions are the best demonstration of their resting on very insufficient grounds. For according to the doctrine of Adye, Sullivan, and M^cArthur, suppose a Court Martial to consist of fifteen members, seven acquit and eight condemn; of these last, five fix the punishment; so that an officer may be cashiered, or a soldier transported

* 4 Blackstone, 391.

as a felon for life by five votes out of fifteen, although he has been found not guilty by seven members. The manifest absurdity of such a consequence naturally led to the opinion maintained by Tytler, which is, as Sir Charles Morgan remarks, tantamount in its effect to the practice which is observed at the Horse Guards. But if the first opinion was erroneous on account of its operating with too much severity against the prisoner, the last one errs still more against public justice by extending too great lenity to delinquents. For suppose a Court consisting of fifteen members, seven acquit and eight condemn. Of the last seven vote cashiering and one a few months' reduction of rank, the seven who acquitted are to be added to this solitary vote and the prisoner escapes with a trifling punishment. Or suppose five acquit and ten condemn, of these last seven vote cashiering and three a few months' reduction of rank, but the five who acquitted are to be added to these three and the prisoner equally escapes. So that in this last case *the majority of the majority* who find the prisoner guilty is not allowed to have any effect, as it is rendered nugatory by counting in favour of the prisoner votes which never were given. But according to the first opinion no anomaly takes place, for *the majority of the majority* is allowed as usual to have effect, although it renders the prisoner liable to be

punished by five members out of fifteen. If either of these opinions, therefore, were to be preferred, this one is certainly most consistent with the established practice of Courts Martial, and it errs merely in giving a power to a few members which they do not legally possess. But the other opinion not only errs equally in this respect, but introduces the unheard-of anomalies of counting votes which were never given, and of depriving a majority of the effect to which it is always entitled.

But the most pernicious consequence which must result from acting on these opinions, is that the punishment awarded never can be proportioned to the degree of guilt of which the prisoner is found culpable. Tytler openly avows, that he thinks that it is perfectly unnecessary to take into consideration the degree of guilt which has been found by the majority of the Court, and that the members who acquit the prisoner ought to vote for the mildest punishment. The practice at the Horse Guards is more considerate to these members, for it saves them from the disagreeable predicament of awarding what they themselves cannot but be convinced is an inadequate punishment, by not requiring a vote from them. But the effect is the same, as their votes are counted in favor of the prisoner. It would hence seem that all these inconsistencies, irregularities, and, ille-

galities, are contrived and intended for the sole benefit and advantage of the prisoner; and that the ends of public justice are entirely disregarded. Objectionable, as it may perhaps be, that a prisoner should be found guilty by the preponderating vote of one member only, still in all cases except capital ones, such is the mode prescribed, and it is not disputed that the verdict so found is to all intents and purposes to be considered as the opinion of the whole Court. It is, also, the only opinion which is published to the army, and it must, therefore, be obvious that the sentences of Courts Martial can never become a rule and guide for the conduct of an officer and soldier, if such sentences be not founded on some one general and invariable principle. For what must be the conclusion drawn by an officer or soldier when he observes that one officer convicted of an offence is sentenced to be reprimanded, and that another officer found guilty of the same identical offence is sentenced to be cashiered; or that one soldier convicted of an offence is sentenced to corporal punishment, and another found guilty of the same identical offence is sentenced to suffer death. It will be said that these are extreme cases, but will any officer of experience venture to affirm that instances of such sentences never did occur? They are, it is to be hoped, very rare, but sufficient discordancies in the finding and sentences

of Courts Martial, though less or more striking, still remain to fill up the long interval which is between these extremes. Nor will it be denied that all these discordancies arise from the generally received opinion that the finding of the *majority* of the Court, if it declare the prisoner guilty, is not binding on the *minority*, and that, therefore, the members who acquit him are at liberty to award the mildest punishment which is in their power.* But the preceding remarks will perhaps demonstrate the erroneousness of this opinion; and that consequently it ought to be considered as a general rule and principle, which would effectually prevent all variance between findings and sentences, that the verdict, if guilty, of the *majority* of the Court shall bind all the members, and that, in consequence, each member shall give his vote on the punishment to be awarded, not according to his private opinion of the innocence of the prisoner, but according to that precise degree

* This opinion, which is in conformity to that of Tyler, is the one which is generally adopted by the officers of the Indian Army; and hence it occurs that in taking the votes of a Court Martial on the punishment to be awarded, it will be found that in the case of an officer some votes will be for a reprimand, while others are for cashiering; and in the case of a soldier some votes will be for a corporal punishment or imprisonment, while others are for death.

of guilt of which the *finding of the Court* has declared him culpable.

It ought also to be recollected that the members of Courts Martial have two perfectly distinct duties to perform, the one that of jurors, and the other that of judges, which ought, in no case, to be confused together. This simple reflection is of itself sufficient to shew how incorrect the foregoing opinions must be, as they evidently consider in a conjoined point of view two acts which are in their nature perfectly distinct. If members, therefore, would merely separate in their ideas the two characters which they have to sustain, they would find no difficulty in the correct and conscientious discharge of both duties. For, after having in the first instance given their votes as jurors, and the verdict of guilty is recorded, they are no longer to act in that character, or to be influenced by any circumstances connected with it; but immediately to assume the character of judges, and to award punishment proportioned to the degree of guilt specified in that verdict, exactly in the same manner as if that verdict had been found by any other twelve persons. It may be, perhaps, difficult to dismiss from their minds, if they have voted for the acquittal of the prisoner, the impression of conviction which they entertain of his innocence, and to proportion punishment to

a degree of guilt of which they do not think him culpable. But as they have sworn to duly administer justice, and as the jury have found the prisoner guilty, they are bound, whatever their private feelings or opinions may be, to award such a punishment as in every respect proportioned to the offence, and calculated for the due maintenance of military discipline.

The preceding observations, it will be remarked, apply merely to those cases in which punishment is left to the discretion of the Court; for in all cases wherein a specific punishment has been prescribed by the Mutiny Act or Articles of War, that punishment alone can be awarded. It requires, therefore, to be observed that with regard to soldiers, there are only two offences in which no discretionary power is left to the Court. For any soldier, who shall do violence to any person who brings provisions, or other necessaries to the camp, garrison, or quarters of His Majesty's forces employed in foreign parts*, or who forces a safeguard*, shall suffer death. In all other cases, of whatever magnitude the crime may be, the punishment is left to the discretion of the Court. But with regard to officers, the offences for which a specific penalty is prescribed are more numerous: for every officer who shall be convicted of having

* Articles of War, sect. 14., Articles 11, 12.

used traitorous or disrespectful words against the king or royal family *, of having signed false or blank certificates †, of having made or signed false muster rolls ‡, of having made false returns ‡, of having received or entertained deserters §, of having challenged or sent a challenge, or having while on guard knowingly and wilfully suffered any persons to go forth to fight a duel, or upbraided any one for refusing a challenge ¶, of having connived at any person selling provisions at exorbitant rates ||, of not having done his utmost to deliver over any military delinquent to the civil power, or of having protected any person against his creditor **, of having been drunk on duty ††, or of having broken his arrest ††, or of having, if an officer commanding a garrison, fort, or barrack, connived at the sale of articles at exorbitant rates §§, shall be cashiered. And every officer convicted of having behaved in a scandalous, infamous manner, such as is unbecoming the character of an officer and a gentleman, shall be discharged the service. ¶¶ And every governor or officer commanding a garrison, fort, or barrack,

* Article 1., sect. 2.

† Article 1., sect. 5.

‡ Article 1, 2, 3, 5., sect. 7.

** Sect. 11.

†† Article 29., sect. 16.

¶¶ Article 30., sect. 16.

† Article 2, 3., sect. 4.

§ Article 2., sect. 6.

|| Article 5., sect. 8.

†† Article 9., sect. 14.

§§ Article 5., sect. 8.

who shall be convicted of having let out stalls to sutlers or laid a duty on, or been interested in the goods sold by them*, or of having embezzled any public stores or money, shall be dismissed the service. †

It is to be observed that Courts Martial in those cases wherein a discretionary power is given to them, cannot legally award any other punishments than such as are known to the common law of England, or such as are according to the custom of war in the like cases. They ought, therefore, to be well assured of its legality before they ever pass any unusual sentence. For there are only four kinds of punishment which are usually awarded against

* Article 4., sect. 8.

† Article 1., sect. 13.

There is one clause in the Mutiny Act, of the meaning of which I must confess myself entirely ignorant. It is the 16th, which declares "that no persons, being *acquitted* or *convicted* of any capital crimes, violences, or offences by the civil magistrate, shall be liable to be punished for the same, otherwise than by cashiering. That an officer, after having been acquitted by the verdict of his country, should in any case be liable to be cashiered, seems altogether inconsistent with any principle of law or justice. It is also possible, that an officer might be convicted of a civil offence, for instance, horsewhipping a man for impertinence, which in no manner whatever affects his character as an officer and a gentleman, and yet he is, according to this clause, liable to be cashiered for such an Act."

an officer. Cashiering*, dismissal; (and in one single instance discharging); reduction of rank in

* A question has been agitated respecting the precise distinction which exists between cashiering and dismissal. But this question is not of much importance, as in every case where the one or the other is prescribed by the Articles of War, that one alone shall be inserted in the sentences of Courts Martial. It seems, however, that formerly cashiering was considered as an infamous and disgraceful punishment, which incapacitated the delinquent from ever being again employed in the army. But this opinion has been long exploded, and that cashiering at present does not necessarily incapacitate is clearly proved by the legislature having thought it requisite to add expressly in several clauses of the Mutiny Act the penalty of disqualification to that of cashiering. That it, also, can now inflict no peculiar infamy or disgrace, must be evident, from its being the penalty prescribed for that act which is generally considered the most characteristic of an officer and a gentleman—the challenging another in vindication of one's honor and character.

But it is still competent for a Court Martial to adjudge an officer to be cashiered with infamy, that is, to be led in front of the troops in the camp, cantonment, or garrison, paraded for the occasion, and there to have his epaulettes torn off his shoulders by the Provost Martial, and these and his sash cut in pieces and thrown in his face, and his sword broken over his head. I have also heard it said; but I know not on what authority, that besides this, the delinquent may be sentenced to receive a kick on the posteriors from the youngest drummer.

A soldier, likewise, if found guilty of any infamous or disgraceful act, may be sentenced to be drummed out of the camp, cantonment, or garrison, which is performed by his

His Majesty's Army, or suspension from rank and pay in the Honorable Company's Forces; and reprimand. The last, however, admits of several degrees, as it may be either public or private, to be given in such manner as the commander in chief or officer approving the sentence may think proper, or the Court may point out the particular manner in which it is to be given. A public reprimand is in common merely published in the general orders of the army, but the officer may also be directed to receive the reprimand on the public parade in front of his regiment, or in open court. A private reprimand is generally given by the officer commanding the prisoner's regiment at his quarters, either without witnesses or in presence of the officers of the regiment, or it may be given in closed court by the president. As it is likewise incumbent on a Court Martial to award something in the form of punishment for every deviation from his duty of which an officer may be found culpable, however trifling it may be, even if it shall have proceeded from an error of judgement, it has become customary in such cases for Courts Martial to sentence the prisoner to be *admonished* in such

being paraded through the principal street or streets with a halter round his neck held by the youngest drummer, and the rest of the drummers following behind beating the rogue's march.

manner as the commander in chief may think proper.

But it is enacted by the 128th clause of the Mutiny Act, "that every paymaster, or other commissioned officer of His Majesty's Forces, or any storekeeper or commissary, or deputy or assistant commissary, or other person employed in the commissariat department, or in any manner in the care or distribution of any money, provisions, forage, or stores belonging to His Majesty's Forces, or for their use, who shall embezzle or fraudulently misapply, or cause to be embezzled or fraudulently misapplied, or shall knowingly and wilfully permit or suffer any money, provisions, forage, arms, clothing, ammunition or other military stores to be embezzled or fraudulently misapplied, or to be spoiled or damaged, may be tried for the same before a General Court Martial; and it shall be lawful for such Court Martial to adjudge any paymaster or other commissioned officer, or storekeeper, or commissary, or deputy or assistant commissary, or other person, to be transported as a felon for life, or for any certain term of years, or to suffer such punishment of pillory, fine, imprisonment, dismissal from His Majesty's service, and incapacity of serving His Majesty in any office civil or military, as any such court shall think fit, according to the nature and degree of the offence;

and every such officer or person shall, in addition to any other punishment, make good the loss and damage sustained which shall have been ascertained by such Court Martial." *

The punishments to be awarded against non-commissioned officers and soldiers are thus described in the 24th clause of the Mutiny Act, "that it shall be lawful for any such General Court Martial, by their sentence or judgment, to inflict imprisonment, solitary or otherwise, or corporal punishment not extending to life or limb, as such court shall think fit on any non-commissioned officers or soldiers for immoralities, misbehaviour, or neglect of duty." Non-commissioned officers may also be adjudged to be reduced and to serve in the ranks as privates; and deserters may be sentenced to be transported as felons for life or for a certain term of years, or to serve in another corps, and to suffer other forfeitures, and to have a mark affixed in their bodies. In no other case, however, can transportation be awarded against an offender, because being a punishment unknown to the common law of England, it can be awarded only under the authority of an express statute, and such authority has not been conveyed by the Annual Mutiny Act to Courts Martial except in the case of

* A clause corresponding to this is not contained in the company's Mutiny Act.

desertion.* It is also to be observed that two punishments of a distinct nature and degree from each other cannot be inflicted for the same offence, unless the power of inflicting both for the same crime is given by some express statute. Flogging, therefore, and imprisonment being separate and distinct punishments, and the power of inflicting them both for the same offence not being given by the Mutiny Act, can never be legally awarded by Courts Martial for one and the same offence.

Death is a punishment which may be awarded equally against an officer or a soldier, but in such cases only as are expressly specified either in the Mutiny Act or in the Articles of War. But numerous as the offences are which are thus declared to be capital, there are only two, as it has been before observed, in which the Court are not at the same time vested with a discretionary power. Death, therefore, is very rarely inflicted on a soldier, and never on an officer. Cases, however, may possibly occur where the Court may be

* For exile and transportation are punishments at present unknown to the common law; and whenever the latter is now inflicted, it is either by the choice of the criminal himself to escape a capital punishment, or else by the express direction of some modern act of parliament. 1 Blackstone, 157.

For this reason no officer or soldier in the honorable company's service can be sentenced to be transported for any offence whatever, as the power of awarding this punishment is not given to Courts Martial by the act 27 G. 2.

compelled to pass a capital sentence, but in such cases it is positively ordered by the Articles of War that no sentence of death shall be given against any offender by any General Court Martial consisting of less than thirteen members, nor unless nine officers present shall concur therein; nor shall such sentence be given in any case where a Court Martial shall consist of more officers than thirteen without the concurrence of two thirds at the least of the officers present.

Such are the punishments which a Court Martial may award, and as most of them admit of various gradations, a Court ought never to find the slightest difficulty in proportioning the punishment to the exact degree of guilt of which they find a prisoner culpable. They should also recollect that their sentence is not final, for should any extenuating circumstances have appeared in favor of the prisoner, but which could not influence the finding of the Court, it is still competent for them to recommend him to mercy. But it is particularly to be observed, that in all cases where a discretionary power of punishment is vested in the Court, a recommendation to mercy ought never to be inserted in the body of the sentence*; but

Horse Guards, 12th April, 1814.

* Remarks on the Court Martial held at Exeter, 27 January 1814, for the trial of Lieut. E. Hancox, of the 11th regiment of foot.

invariably to be written under the sentence and the signature of the president.* In cases however where punishment is not discretionary, a recommendation to mercy may be inserted in the body of the sentence, but it must then be simple and unqualified, and should the Court wish to support it by any reasons, these ought to be assigned in a separate and distinct manner and not in the sentence.

There is still one circumstance of great importance connected with the finding and sentence of a

"The Prince Regent has been pleased, in the name and on the behalf of His Majesty, to approve and confirm the finding and sentence of the Court, but His Royal Highness has expressed his surprise that they should have been induced in the present instance to allow their feelings so far to blind their judgments as to insert the recommendations by Courts Martial in the body of their proceedings, when the sentence is discretionary with the Court; it is not only irregular in itself, but most embarrassing to the sovereign, who is alone to judge whether the circumstances of a case, when considered with the general good of the service, can admit the exercise of mercy in the confirmation of a sentence." — *James's Case-Book of Courts Martial*, p. 619.

* "It often happens that the members of a Court Martial think it right to recommend a prisoner to the consideration and mercy of the King, or commanding officer (as the case may be): when this happens it should always be written under the sentence." — *Sir Charles Morgan's Remarks*, James's edition of Tytler, Advertisement, p. xxii.

Court Martial which requires remark. For Sir Charles Morgan has observed, "But I know not upon what authority it is stated, that when the Court by the illness of one of its members, or any other unforeseen circumstance, is reduced to an even number, and the Court shall be equally divided in opinion upon any point, the president is to exercise a double vote; I have ever understood the law to be otherwise; and I have to add that the practice of the Horse Guards does not countenance that position." * Directly contrary to this is the practice of Courts Martial held in the army of India, and it is believed of such as are held in His Majesty's forces every where except at the Horse Guards; for at them, in conformity to the opinion of Tytler, the president has always a casting vote when the Court is equally divided. It must at the same time be admitted that the practice of the Horse Guards may, *prima facie*, appear the most legal because it conforms to that of the Courts of King's Bench and Common Pleas. In order, however, to render a precedent conclusive, it is obvious that the cases to which it is applied must be exactly similar. But can this, in any sense of the term, be predicated of the office and duty of judges in the Court of King's

* Advertisement to James's edition of Tytler, p. x.

Bench and of the office and duty of members of Courts Martial in their judicial capacity? In the one case, after the jury have found the verdict of guilty, the nature of the punishment to be in consequence awarded is clear and defined, and the judge merely declares the penalty prescribed by a law with which from long experience and daily practice he is intimately conversant; and there can scarcely ever occur any instance, where on account of doubts having arisen on some point of law, and of the judges being equally divided in opinion thereon, an offender escapes from all punishment. At Courts Martial, on the contrary, officers, possessing little or no experience of law, and unassisted by any year books, decisions, or precedents of any kind, are called upon to award punishments, which although of the same nature are in their extent so undefined and uncertain that the quantity awarded absolutely divests them of their common character; and thus so far from declaring the penalty prescribed by a fixed and invariable law, they in most cases actually make the law itself for every particular occasion. Doubts therefore and differences of opinion must continually arise, and if the Court be equally divided and the president have not a casting vote, the inevitable consequence must be that many an offender will escape unpunished.

Should a circumstance of this kind possibly occur in the Court of King's Bench, it will be obvious that it could be of no importance whatever, as in so large an empire the case of a solitary individual would either be unknown or unattended to. But in the army the sentence of every Court Martial is published and carefully made known to all ranks; and, consequently, every hope or expectation of escaping merited punishment which is divulged and held forth to their notice must tend to produce effects highly prejudicial to discipline. Suppose an officer found guilty by all the members of a Court Martial, consisting of fourteen members, of highly disgraceful conduct, unbecoming an officer and a gentleman, and that, on awarding punishment, seven members vote cashiering and seven reduction of rank; or suppose a soldier found guilty of repeated desertion, and on awarding punishment seven vote death and seven transportation as a felon for life, it will follow that, if the president have not a casting vote, the prisoner, though found guilty by the whole Court, must be discharged without receiving any punishment whatever. But not only this consequence must be the result, but as the Court cannot avoid giving an opinion on the charge, a sentence to the following effect must be published to the whole army — that the Court are of opinion that the prisoner, lieutenant A. B., is guilty of the charge preferred

against him, viz. for highly disgraceful conduct, unbecoming an officer and a gentleman—or that the prisoner, private C. D. is guilty of the charge preferred against him, viz. for repeated desertion—but in consequence of the Court being equally divided in opinion on the punishment to be awarded, they are in consequence prevented from passing any sentence. The officer thus returns to his regiment and the functions of his commission, divested of the character of an officer and a gentleman; and the soldier to his regiment exhibiting an example that however repeatedly a soldier may desert, there is still a chance of his escaping, when brought to trial, every kind of punishment. But it is perfectly impossible that consequences similarly prejudicial can ever result from an equal division in opinion of the judges of the Court of King's Bench, and it may therefore be justly concluded that, as the cases are entirely dissimilar, the precedent drawn from the practice of that Court is perfectly inapplicable to the practice which ought to prevail at Courts Martial.

But, if the preceding observations be correct, it will follow that Sir Charles Morgan's remark on Tytler's opinion, although confirmed by the practice of the Horse Guards, rests on no sufficient grounds. For the legal precedent which he has adduced in support of it, whether drawn from

courts of law or courts of equity, can never apply to a Court Martial, which is in every respect so differently constituted. Nor does the custom of war in the like cases support it, for if an enquiry were made it would no doubt be found that the general practice both of the king's and company's army has always been that the President should have a casting vote whenever a Court Martial were equally divided in opinion on any point. If then, neither law nor the custom of war be repugnant to the casting vote of the president, and if the most prejudicial consequences must result from allowing a convicted offender to escape unpunished in case of a Court Martial being equally divided in opinion on the punishment to be awarded, not even the practice of the Horse Guards, nor any authority less than that of the sovereign, ought to induce a Court Martial to relinquish a practice which is the best adapted to promote the ends of justice.

CHAP. X.
 THE 4TH ARTICLE OF THE 24TH SECTION OF THE
 ARTICLES OF WAR.

In the preceding remarks I have restricted myself solely to a consideration of the practice of Courts Martial in the case of offences purely military. But it is expressly provided by the 4th article of the 24th section of the Articles of War, that, in foreign parts where there is no form of civil judicature in force, Courts Martial may try and punish all crimes and offences of a civil nature. His late Majesty was at the same time pleased to declare that the true meaning and intent of the latter part of this article, "and the persons so accused, if found guilty, shall suffer death, or such other punishment as by the sentence of any such General Court Martial shall be awarded," is that Courts Martial exercising jurisdiction under this article are bound to award such punishments only as are known to the laws of England, and that they are bound also to apply to each particular offence the same punishment both in the kind and degree that is applied by the common or statute

law of England.* A few remarks, therefore, on the civil crimes which may thus come before a Court Martial, and which, in general, are homicide, rape, sodomy, burglary, larceny, perjury, and, in some few cases, coining, forgery, and fraud, may be considered necessary.

Homicide. † — The highest degree of homicide is deliberate and wilful murder, which is defined to be, when a person of sound mind and discretion unlawfully kills any person who is under the king's peace with malice aforethought either express or implied; or wounds or hurts any person so that he dies of the wound or hurt within a year and a day. But the grand criterion which distinguishes murder from other killing is malice aforethought. The malice prepense is not so properly spite or malevolence to the deceased in particular, as any evil design in general; and it may be either express or implied in law.

Express malice is when one, with a sedate deliberate mind and formed design, doth kill another, which formed design is evidenced by external circumstances discovering that inward intention; as lying in wait, antecedent menaces,

* His Royal Highness the commander-in-chief's letter to the commander-in-chief in India, dated December 12. 1807.

† What follows respecting crimes is extracted principally from Blackstone's Commentaries, and in general, in the author's own words.

former grudges, and concerted schemes to do him some bodily harm. This takes in the case of deliberate duelling where both parties meet avowedly with an intent to murder: thinking it their duty as gentlemen, and claiming it as their right, to wanton with their own lives and those of their fellow creatures, without any warrant or authority from any power either divine or human, but in direct contradiction to the laws both of God and man; and, therefore, the law has justly fixed the crime and punishment of murder on them and on their seconds also.

If even upon sudden and inadequate provocation, one beats another in a cruel and unusual manner, so that he dies, though he did not intend his death, yet he is guilty of murder by express malice. Neither shall he be guilty of a less crime, who kills another in consequence of such a wilful act as shews him an enemy to all mankind in general; as going deliberately and coolly discharging a gun among a multitude of people. So, if a man resolves to kill the next man he meets, and does kill him, it is murder, although he knew him not, for this is universal malice.

In many cases where no malice is expressed the law will imply it; as where a man wilfully poisons another, in such a deliberate act the law presumes malice, though no particular enmity can be proved.

And if a man kills another suddenly, without any, or without considerable provocation, the law implies malice.

We may take it for a general rule that all homicide is malicious, and of course amounts to murder, unless where justified by the command or permission of the law, excused on the account of accident or self-preservation, or alleviated into manslaughter, by being either the involuntary consequence of some act, not strictly lawful, or (if voluntary) by some sudden and sufficiently violent provocation. And all these circumstances of justification, excuse, or alleviation, it is incumbent upon the prisoner to make out to the satisfaction of the Court and the Jury; the latter of whom are to decide whether the circumstances alleged are proved to have actually existed; the former, how far they extend to take away or mitigate the guilt. For all homicide is presumed to be malicious until the contrary appeareth upon evidence.

The punishment of any person found guilty of wilful murder is that he shall be hanged, and that his body shall be delivered to the surgeons to be dissected and anatomized; unless the Judge directs his body to be hung in chains, but in no wise to be buried without dissection.

But, although a prisoner may be charged with and tried for wilful murder, and it be proved that

he killed the deceased, still the evidence may shew that the act did not proceed from malice prepense. In which case the Court must acquit the prisoner of wilful murder, but may find him guilty of any one of the following lesser degrees of homicide.

1st. Manslaughter, which is defined to be, the unlawful killing of another without malice either expressed or implied. As if upon a sudden quarrel two persons fight, and one of them kills the other, this is manslaughter; and so it is, if they upon such an occasion go out and fight in a field, for this is one continued act of passion. So also if a man be greatly provoked, as by pulling his nose or other great indignity, and immediately kills the aggressor, though this is not excusable *se defendendo*, since there is no absolute necessity for doing it to preserve himself; yet neither is it murder, for there is no previous malice; but it is manslaughter. But in this, and in every other case of homicide upon provocation, if there be a sufficient cooling time for passion to subside and reason to interpose, and the person so provoked afterwards kills the other, this is deliberate revenge, and not heat of blood, and accordingly amounts to murder.

“ But no breach of a man's word or promise, no trespass either to lands or goods, no affront by bare words or gestures, however false or malicious it may be, and aggravated by the most provoking

circumstances, will excuse him from being guilty of murder who is so far transported thereby as immediately to attack the person who offends him, in such a manner as manifestly endangers his life, without giving him time to put himself on his guard, if he kills him in pursuance of such assault whether the person slain did at all fight in his defence or not." *

The punishment for manslaughter is imprisonment for any term not exceeding a year, with a moderate fine or burning in the hand. But by a late act, 3 Geo. 4. c. 38. s. 1., that part of the former punishment by burning in the hand, is taken away, and the offender may be transported for life, or for such less period as the Court shall think fit: or be imprisoned only, or imprisoned and kept to hard labour for any term not exceeding three years; or to pecuniary fine; or to such punishment as he would have been liable to if he had continued liable to such burning in the hand.

2d. Excusable homicide, which is of two sorts, either *per infortunium* by misadventure, or *se defendendo* upon a principle of self-preservation. Homicide by misadventure, is where a man doing a lawful act, without any intention of hurt, unfortunately kills another; as where a man is at work

* 1 Hawkins, P. C. 192.

with a hatchet, and the head thereof flies off and kills a bystander, or where a person, qualified to keep a gun, is shooting at a mark and undesignedly kills a man ; for the act is lawful, and the effect is merely accidental. Homicide in self-defence is when a man, in order to protect himself from an assault or the like, in the course of sudden brawl or quarrel, kills him who assaults him. This right of natural defence does not imply a right of attacking ; for instead of attacking one another for injuries past and impending, men need only have recourse to the proper tribunals of justice. They cannot, therefore, legally exercise this right of preventive defence, but in sudden and violent cases when certain and immediate suffering would be the consequence of waiting for the assistance of the law. Wherefore, to excuse homicide by the plea of self-defence, it must appear that the slayer had no other possible (or at least probable) means of escaping from his assailant.

Where the homicide does not amount to murder or manlaughter, it is the universal practise for the judge to direct an acquittal.

3d. Justifiable homicide, "which must be owing to some unavoidable necessity, to which a person who kills another must be reduced, without any manner or fault in himself. And there must be

no malice coloured under pretence of necessity; for wherever a person who kills another acts, in truth upon malice, and takes occasion from the appearance of necessity to execute his own private revenge, he is guilty of murder." * If, for instance, an officer in the execution of his office, kills a person that assaults and resists him, that is justifiable homicide.

In instances of justifiable homicide it may be observed, that the slayer is in no kind of fault whatsoever, not even in the minutest degree; and is, therefore, to be totally acquitted and discharged with commendation rather than blame.

There is another crime in some degree connected with murder, and of which soldiers may be sometimes guilty, for it is enacted by 43 Geo. 3. c. 58. † if any person shall wilfully and maliciously shoot at any of His Majesty's subjects, or shall present or level any kind of loaded fire-arms at any one, and attempt to discharge the same, by drawing the trigger or in any other manner, with intent to murder, rob, maim, disfigure or disable him, or to do him some grievous bodily harm, he, his counsellors, aiders, and abettors shall be guilty of

* 1 Hawkins, P.C. 168.

† Commonly called Lord Ellenborough's act.

felony without benefit of clergy; * provided, that if it shall appear upon the trial that such shooting and attempt to discharge fire-arms were committed under circumstances that, if death had ensued, the same would not have amounted to the crime of murder, then the person indicted shall be acquitted.

Rape, is the carnal knowledge of a woman forcibly and against her will, and if any person shall unlawfully and carnally know or abuse any woman child under the age of ten years, whether with her consent or against, he shall be guilty of felony without benefit of clergy.

In cases of rape, the party ravished may give evidence upon oath, and is in law a competent witness; but the credibility of her testimony, and how far forth she is to be believed, must be left to the jury upon the circumstances of fact that concur in that testimony. For instance, if the witness be of good fame; if she presently discovered the offence, and made search for the offender; if the party accused fled for it: these and the like are concurring circumstances which give greater probability to her evidence. But on the other

* That is, of a capital offence: a felony without benefit of clergy being in other words, one worthy of instant death. See 4 Bla. Com. p. 18.

side, if she be of evil fame, and stand unsupported by others; if she concealed the injury for any considerable time after she had opportunity to complain; if the place where the fact was alleged to be committed, was where it was possible she might have been heard, and she made no outcry: these and the like circumstances carry a strong, but not conclusive, presumption that her testimony is false or feigned. And if the rape be charged to be committed on an infant under twelve years of age, she may be a competent witness. For it is now settled that no hearsay evidence can be given of the declaration of a child who hath not capacity to be sworn, nor can such child be examined in court without oath: and that there is no determinate age at which the oath of a child ought to be admitted or rejected. Yet, where the evidence of children is admitted, it is much to be wished, in order to render their evidence credible, that there should be some concurrent testimony of time, place, and circumstances, in order to make out the fact; and that the conviction should not be grounded singly on the unsupported accusation of an infant under years of discretion.

The punishment of rape is death by being hanged.

Sodomy, which is defined to be a carnal

knowledge, committed against the order of nature, by man with man, or in the same unnatural manner with woman, or by man or woman in any manner with beast. What has been observed respecting rape, especially with regard to the manner of proof, which ought to be the more clear in proportion as the crime is the more detestable, may be applied to this offence which is of still deeper malignity.

If the party on whom this offence is committed be not within the age of discretion, namely, is under fourteen, it is not felony in him, but only in the agent. If both be of the age of discretion, it is felony in both, and the punishment is death.*

Disagreeable as the subject is, it is absolutely necessary to observe that to convict a prisoner of either rape or sodomy it is requisite that the two facts of penetration and emission of semen be sufficiently proved. Without the first of these, neither of these crimes can be committed; but with regard to the other, a difference of opinion has arisen among the judges of England; some holding that these offences are complete by penetration only, and others that both penetration and emis-

* A male infant under the age of fourteen years, is presumed by law to be incapable of committing either this or the foregoing crime, and cannot, therefore, be found guilty of them.

sion are necessary. It seems, however, to be now the general rule that the fact of penetration is, *primâ facie*, evidence of emission, unless the contrary appears probable from the circumstances of the case; and therefore if the fact of penetration be proved, the fact of emission may be left to the jury.* It will be hence obvious how very difficult it must be to procure legal proof sufficient to convict a soldier of either of these offences. With regard, indeed, to rape, as a certain degree of force and violence is always necessary, there will be in general some circumstances that will concur in the proof of the crime. But with respect to the other, as it is committed secretly and with the mutual consent of the parties, positive proof is scarcely ever procurable, and presumptive evidence ought never to be admitted in such a case. The party, however, on whom the offence is committed is certainly a competent witness. But can any credit be given to the testimony of one who stands forth to avow his own infamy and turpitude? In deciding, therefore, on the guilt of a prisoner accused of this offence, every member of a Court Martial ought to recollect this very just remark of

* M'Arthur, vol. i. p. 81. *et. seq.* It should, however, be coupled with other circumstances of time, &c., so as to lay a proper foundation for the jury to conclude that the crime was completely committed.

Blackstone; "A crime which ought to be strictly and impartially proved, and then as strictly and impartially punished. But it is an offence of so dark a nature, so easily charged, and the negative so difficult to be proved, that the accusation should be clearly made out; for, if false, it deserves a punishment inferior only to that of the crime itself."

If, however, the proof is not sufficient to admit of a charge for either of these crimes being preferred against a delinquent, he may be accused of an assault with intent to commit the same. For assaults, batteries, and wounding, taken in a public light as a breach of the king's peace, an affront to his government, and a damage done to his subjects, are indictable and punishable with fines and imprisonment; or with other ignominious corporal penalties, where they are committed with any very atrocious design. As in case of an assault with intent to murder, or with an intent to commit either of the crimes last spoken of; for which intentional assaults, in the two last cases, indictments are much more usual than for the absolute perpetration of the facts themselves, on account of the difficulty of proof, or when both parties are consenting to an unnatural attempt, it is usual not to charge any assault; but that one of them laid hands on the other with intent to commit, and that the other permitted the same

with intent to suffer, the commissions of the abominable crime before mentioned; and in all these cases, besides heavy fine and imprisonment, it is usual to award judgment of the pillory. But now by 56 Geo. 3. c. 138. the punishment of pillory is taken away except in cases of perjury, and subornation of perjury; and in all cases where it has heretofore formed the whole or part of the judgment, the Court may sentence the offender to fine or imprisonment, or both, in their discretion,

Burglary, which is defined to be the breaking and entering into the mansion of another in the night, with intent to commit some felony within the same, whether the felonious intent be executed or not. It must be by night and not by day; for in the day time there is no burglary; and as to what is reckoned night or day for this purpose, it is held that if there be daylight or twilight enough, begun or left to discern a man's face withal, it is no burglary. It must be committed in a mansion or dwelling-house. For no distant barn, ware-house, or the like are under the same privileges, nor looked upon as a man's castle of defence: nor is a breaking open of houses wherein no man resides, and which, therefore, for the time being are not mansion-houses, attended with the same circumstances of midnight terror. A house, however, wherein a man sometimes resides, and which

the owner has left only for a short season, *animus revertendi*, is the object of burglary, though no one be in it at the time of the fact being committed; and if the barn, stable, or warehouse be parcel of the mansion-house and within the same common fence or curtilage, though not under the same roof or contiguous, a burglary may be committed therein. But to break and enter a shop in which the shopkeeper never lodges, but only works or trades there in the day time, does not amount to burglary, and is only larceny; but if he or his servant usually or frequently lodge in the shop at night, it is then a mansion-house in which burglary may be committed; neither can burglary be committed in a tent or booth erected in a market or fair, though the owner may lodge therein.

It is deemed a burglarious entry into the house when the person breaks the house, and his body, or any part thereof, as his arm, is within any part of the house; or when he puts a gun into a window he has broken, or into a hole of the house which he has made with intent to murder or kill. But every entrance into the house by a trespass is not a breaking in this case; for there must be an actual breaking and with intent to commit a felony. If the door of a mansion should stand open, and the thief enter, this is not breaking; or if the window of the house be open, and a thief with a

hook or other instrument should draw out some of the goods of the owner, this is no burglary, because there is no actual breaking of the house. But if the thief should break the glass of the window and with a hook or other instrument draw out some of the goods of the owner, this is burglary, for there is an actual breaking of the house: actual breaking, however, is not always necessary to constitute burglary, for to knock at the door, and upon its being opened, to rush in with a felonious intent, this is burglary. And so if a servant opens and enters his master's chamber door with a felonious design, it is burglary; or if the servant conspires with a robber, and lets him into the house by night, this is burglary in both.

As to the intent; it is clear that such breaking and entry must be with a felonious intent, otherwise it is only a trespass; and it is the same, whether such intention be actually carried into execution, or only demonstrated by some attempt or overt act, of which the jury is to judge; and therefore such a breach and entry of a house as has been before described, by night, with intent to commit a robbery, a murder, a rape, or any other felony, is burglary, whether the thing be actually perpetrated or not.

If several persons come in the night to commit a burglary and only one of them shall enter the

house, the rest standing to watch at a distance, this is burglary in all.

The punishment of burglary is death.

Larceny, which is defined to be, the felonious taking and carrying away the personal goods of another. It must be felonious and fraudulent, for felony is always accompanied with an evil intention, and therefore shall not be imputed to a mere mistake or misanimadversion. For the mind only makes the taking of another's goods to be felony, or a bare trespass only; but as the variety of circumstances is so great, and the complications thereof so mingled, it is impossible to prescribe all the circumstances evidencing a felonious intent, or the contrary; it must therefore be left to the due and attentive consideration of the judge and jury; wherein the best rule is, in doubtful matters, rather to incline to acquittal than conviction. But in general, it may be observed, that the ordinary discovery of a felonious intent is, if the party does it secretly, or, being charged with the goods, denies it. This requisite, the felonious intent, besides excusing those who labor under incapacities of mind or will, indemnifies also mere trespassers and other petty offenders.

Larceny is divided into grand and petit; and as grand larceny is a felonious and fraudulent taking

of the personal goods of another *above* the value of twelve pence; so it is petit larceny where the thing stolen is *but of the value of twelve pence or under*.

The punishment of grand larceny is death in the following cases: first, in larcenies *above the value of twelve pence*, committed

1st, In a church or chapel, with or without violence, or breaking the same.

2dly, In a booth, or market, or fair, in the day time, or in the night, by violence, or breaking the same; the owner, or some of his family being therein.

3dly, By robbing a dwelling-house in the day time, (which robbery implies a breaking) no person being therein.

4thly, In a dwelling-house, by day or night, without breaking the same, any person being therein, and put in fear.

Secondly, In larcenies to the *value of five shillings*, committed

1st, By breaking any dwelling-house, or any out-house, shop, or warehouse, thereunto belonging, in the day time, although no person be therein.

3dly, By privately stealing goods, wares, or merchandize, in any shop or warehouse, coach-house or stable, by day or by night, though the same be not broken open, and though no person be therein. *

3dly, In larcenies to the *value of forty shillings*, in a dwelling house, or its out-houses, although the same be not broken, and whether any person be therein or no. †

4thly, In privately stealing from a man's person, as by picking his pocket, or the-like, privily without his knowledge, goods or money *above the value of twelve pence*. ‡ And, lastly, in open and violent larceny from the person, or robbery.

Robbery is the felonious and forcible taking from the person of another of goods or money to any value, by violence or putting him in fear.

1st, There must be a taking, otherwise it is not a robbery, but only a misdemeanor. If the

* Extended by 1 Geo. 4. c. 117. to 15*l.*, and made clergyable; but the offender may be transported for life, or any less period.

† Upon an indictment for burglariously breaking and entering a dwelling-house, and stealing therein property to the value of 40*s.*, the prisoner may be acquitted of the breaking, and be capitally convicted of stealing in the dwelling-house.

‡ Now made clergyable by 48 Geo. 3. c. 129., and not limited to any sum.

thief, having once taken a purse, returns it, still it is a robbery.

2dly, It is immaterial of what value the thing taken is; a penny as well as a pound, thus forcibly extorted, makes a robbery.

3dly, Lastly, the taking must be by force, or a previous putting in fear; not that it is indeed necessary, though usual, to lay in the indictment that the robbery was committed by putting in fear; it is sufficient, if laid to be done by violence. And when it is laid to be done by putting in fear, this does not imply any great degree of terror or affright in the party robbed; it is enough that so much force, or threatening, by word or gesture, be used, as might create an apprehension of danger, or induce a man to part with his property, without or against his consent. *

All these cases are considered as aggravations of simple larceny, and are, therefore, excluded from the benefit of clergy. But, in all other cases by the modern statute law, unless, where the benefit of clergy is taken away by the express words of an act of parliament, a person who com-

* It is on this principle that the extorting of money by threatening to carry any one before a magistrate, and to prosecute him for an unnatural crime, is held in law to be a robbery, and consequently, a capital offence.

mits a simple larceny to the value of thirteen pence, or thirteen hundred pounds, though guilty of a capital offence, shall be excused the pains of death; but this is only for the first offence. In a prosecution, therefore, for a simple larceny in general, it is not very material to the prisoner, whether he is convicted of grand or petit larceny. But the jury may find specially, that the goods stolen were *under the value* of twelve pence.

The punishment of grand larceny, in cases where benefit of clergy is allowed, and of petit larceny is the same, and will be mentioned hereafter.

Receiving of stolen goods. Connected with this crime, is the receiving stolen goods *knowing them to be stolen*, which is a high misdemeanor and affront to public justice. It has been therefore enacted, that all persons convicted of buying or receiving stolen goods, knowing them to be stolen, whether the principal be guilty of grand or petit larceny, shall be transported for fourteen years. But the buyer, or receiver, cannot be tried nor punished until the person who stole them is convicted. The receiver, however, may be prosecuted for a misdemeanor, and be punished by fine, imprisonment, or whipping, whether the principal felon be or be not convicted, or be not amenable to justice.

Perjury is a crime committed when a lawful oath is administered in some judicial proceeding to a person who swears wilfully, absolutely, and falsely, in a matter material to the issue or point in question; but the law takes no notice of any perjury but such as is committed in some court of justice, having power to administer an oath, or before some magistrate or proper officer, invested with a similar authority relative to a civil suit, or criminal prosecution, or matter in bankruptcy. The false oath requisite to constitute the offence of perjury must be taken wilfully; that is, with some degree of deliberation; for, if upon the whole circumstances of the case it shall appear probable that it was owing rather to the weakness than to the perverseness of the party, as where it was occasioned by surprise or inadvertency or a mistake of the true state of the question, it will not amount to wilful and corrupt perjury. The false oath also must be in some point material to the fact in issue; for, if it only be in collateral and unimportant circumstances, it is not penal. It is likewise enacted by the 148th clause of the Annual Mutiny Act, "that any person taking a false oath in any case wherein an oath is required to be taken by this act, shall be deemed guilty of wilful and corrupt perjury, and being thereof duly convicted shall be liable to such pains and penalties as by

any laws now in force any persons convicted of wilful and corrupt perjury are subject and liable to."

To convict a prisoner of perjury two witnesses are necessary.

Subornation of perjury. Connected with this crime is subornation of perjury, which is "the procuring a man to take a false oath, amounting to perjury, who actually takes such oath. But if the person incited to take such an oath shall not take it, the person by whom he was so incited is not guilty of subornation of perjury, but he is liable to be punished not only by fine, but also by infamous corporal punishment." *

The punishment of perjury and subornation of perjury is the same, and is perpetual infamy, to be set in the pillory with both ears nailed to it, and fine or confinement in a house of correction for any term not exceeding seven years, or transportation for seven years.

In both these cases Courts Martial ought to attend to this remark of Sir Charles Morgan. "I should by no means recommend it to a Court Martial to punish by their own authority a person, even of a military description, for the crime of perjury committed at their bar, further than by confining

* 2 Hawkins, P.C. 91.

him, in order to be proceeded against at law." The opinion, however, must be understood as referring only to a charge for wilful and corrupt perjury so as to bring the prisoner under the pains and penalties of the law. For there is no doubt but that an officer or soldier may be tried and punished by a Court Martial for prevarication in any evidence which he may give, as a military offence coming under the 2d article 24th section of the Articles of War.

Coining. It is high treason to counterfeit the coin of the realm, or to clip, wash, round, file, or by any ways or means to impair, diminish, falsify, scale, or lighten the proper coin of the realm. This offence, therefore, could not be committed or punished in foreign parts were it not for these express words of this Article of War: "Coining or clipping the coin of Great Britain or Ireland, or any foreign coin current in the garrison or place under his command;" that is, of the commander in chief by whose warrant the court is held.

The punishment of coining for male offenders, is to be drawn on a sledge or hurdle to the place of execution, and there to be hanged by the neck till dead: and for women, to be drawn to the gallows, and there to be burned alive.

If any person shall take, receive, pay, or put off any counterfeit coin, or any kind of coin, unlawfully diminished, and not cut in pieces, at or for a lower value than the same by its denomination shall import, or was coined or counterfeited for, he shall be guilty of felony, and suffer death as in case of felony; and if any person shall tender in payment any counterfeit coin knowing it to be so, he shall for the first offence suffer six months imprisonment, and find sureties for his good behaviour for six months longer; for the second offence, he shall suffer two years imprisonment, and find sureties for two years more; and for the third offence, he shall be guilty of felony without benefit of clergy.

Forgery, at common law, denotes a *false* making (which includes every alteration of or addition to a true instrument), a making *malo animo*, of any written instrument for the purpose of fraud and deceit.* It is unnecessary, however, to enter into the various kinds and degrees of forgery which are known in law; as the following statute, the 2 Geo. 2. c. 25., sufficiently explains the nature of this offence as far as it is likely to occur in the army, and at the same time declares the punishment which the commission of it shall incur. "If any person shall falsely make, forge, or counter-

* 2 East, P.C. 852.

feit, or cause or procure to be falsely made, &c., or willingly act or assist in false making, &c., any deed, will, testament, bond, writing obligatory, bill of exchange, promissory note for payment of money, indorsement or assignment of any bill of exchange or promissory note for payment of money, or any acquittance or receipt either for money or goods, with intent to defraud any person whatsoever; or shall alter or publish as true, any false, forged, or counterfeited deed, &c., with intent to defraud any person, knowing the same to be false, forged, or counterfeited; every such person being thereof lawfully convicted shall be deemed guilty of felony without benefit of clergy."

Fraud. The ingredients of this offence are the obtaining money [or goods] by false pretences with intent to defraud: barely asking another for a sum of money [or goods] is not sufficient, but some pretence must be used, and that pretence false; and the intent is necessary to constitute the crime.* And by stat. 30 Geo. 2. c. 24. s. 1. it is enacted, "that all persons who knowingly and designedly by false pretence or pretences, shall obtain from any person or persons money, goods, wares or merchandizes, with intent to cheat or defraud any person or persons of the same, shall be deemed

* East, P.C. p. 830. The legal name of this offence is *cheating*.

offenders against law and the public peace; and the Court before whom such offenders shall be tried shall on conviction order them to be fined and imprisoned, or to be put in the pillory, or publicly whipped, or transported, according to the laws made for the transportation of offenders, &c., for the term of seven years, as the Court shall think fit."

Connected with this subject, is the obtaining money, by persons fraudulently enlisting themselves, against which the Annual Mutiny Acts usually provide a punishment. The 57 Geo. 3. c. 12. s. 96. provides, that apprentices or other disqualified persons, making false representations as to any particular contained in the certificates requisite to enlistment, and by means thereof obtaining any bounty or other money, shall be deemed guilty of obtaining money under false pretences within the meaning of the 30 Geo. 3. c. 24., and be subject to be imprisoned and kept to hard labour for two years.

Principals and accessories. In deciding on these and similar crimes, some knowledge of the distinctions established by law between principal and accessory is indispensably requisite. A man, therefore, may be principal in an offence in two degrees. A principal in the first degree, is he that is the actor, or absolute perpetrator of the

crime; and in the second degree, he who is present, aiding, and abetting the fact to be done; which presence need not always be an actual immediate standing by within sight or hearing of the fact; but there may also be a constructive presence, as when one commits a robbery or murder, and another keeps watch or guard at some convenient distance.

The punishment of a principal in the first and second degree is, in general, the same.

An accessory, is he who is not the chief actor in the offence, nor present at its performance, but is some way concerned therein, either *before* or *after* the fact is committed.

An accessory *before* the fact is defined to be one who, being absent at the time of the crime committed, doth yet procure, counsel, or command another to commit a crime. Herein absence is necessary to make him an accessory, for if such procurer or the like, be present, he is guilty of the crime as principal. If A. then, advises B. to kill another, and B. does it in the absence of A., now B. is principal, and A. accessory in the murder. And it is also settled, that whoever procureth a felony to be committed, though it be by the intervention of a third person, is an accessory before the fact. It is likewise a

rule, that he who in any wise commands or counsels another to commit an unlawful act, is accessory to all that ensues upon that unlawful act; but is not accessory to any act distinct from the other.

An accessory *after* the fact may be, where a person knowing a felony to have been committed receives, relieves, comforts, or assists the felon. Therefore, to make an accessory *after* the fact, it is in the first place necessary, that he knows of the felony committed. In the next place, he must receive, comfort, abet, or assist him. And; generally, any assistance whatever given to a felon, to hinder his being apprehended, tried, or suffering punishment, makes the assister an accessory. But the felony must be complete at the time of the assistance given, else it makes not the assistant an accessory. As if one wounds another mortally, and after the wound given, but before death ensues, a person assists or receives the delinquent: this does not make him an accessory to the homicide; for till death ensues, there is no felony committed.

It is, however, much easier to state the general rule with regard to principal and accessory, than to specify the particular offences that admit of accessories, or the manner in which accessories are to be tried and punished. It may, therefore,

be observed in general, that in high treason there are no accessories either before or after the fact, for the consenters, aiders, abettors, and knowing receivers, and comforters of traitors, are all principals. So, too, in petit larceny, and in all crimes under the degree of felony, there are no accessories either before or after the fact; but all persons concerned therein, if guilty at all, are principals. But in petit treason, murder, and felonies, with or without benefit of clergy, there may be accessories; except only in those offences, which by judgment of law are sudden and unpremeditated, as manslaughter and the like, which, therefore, cannot have any accessories before the fact.

A principal in the second degree may be tried and punished although the actual perpetrator of the crime has not been convicted. But an accessory cannot be tried until the principal is convicted. If, however, he will waive that benefit, and put himself upon his trial, before the principal be tried, he may; and his conviction or acquittal in such trial is good. But it seems necessary in case of conviction to respite judgment till the principal be convicted; for if the principal be afterwards acquitted, the conviction of the accessory is annulled, and no judgment ought to be given against him; but if the accessory be acquitted, that acquittal is good, and he shall be dis-

charged. . . . The principal and accessory may also be joined in one indictment and tried together, and the accessory may then enter into the full defence of the principal, and avail himself of every matter of fact and every point of law tending to his acquittal, and if the jury find the principal not guilty they must also acquit the accessory. But if they be tried separately though a man be indicted as accessory and acquitted, he may afterwards be indicted as principal; for an acquittal of receiving or counselling a felon is no acquittal of the felony itself. It is, however, a matter of some doubt, whether, if a man be acquitted as principal, he can be afterwards indicted as accessory *before* the fact. But it is clearly held, that one acquitted as principal may be indicted as an accessory *after* the fact.

In most cases, and particularly in murder and robbery, accessories *before* the fact are excluded from benefit of clergy, and are therefore punished with death.

But in all cases, accessories *after* the fact are allowed the benefit of clergy.

The punishment of larceny and clergyable offences is thus fixed by statute.

That when any persons shall be convicted of any larceny, either grand or petit, or any felonious

stealing, or taking of money, or goods and chattels either from the person or the house of another, or in any other manner, and who by the law shall be entitled to the benefit of clergy and liable only to the penalties of burning in the hand or whipping, the Court in their discretion, instead of such burning in the hand or whipping, may direct such offenders to be transported for seven years. And all offenders liable to transportation may, in lieu thereof, at the discretion of the judges, be employed, if males, (except in the case of petit larceny) in hard labour for the benefit of some public navigation (or work); or whether males or females, may, in all cases, be confined to hard labour in penitentiary houses for any term not exceeding seven years.* It is also enacted, that, instead of burning in the hand, the Court in all clergyable offences may impose a pecuniary fine.

It will be obvious that, as the whole jurisdiction of the Court of King's Bench is vested by this article in Courts Martial held in foreign parts where no form of civil judicature is in force, as

* And now by 53 Geo. 3. c. 162., henceforth any court may pass on persons convicted before them of felony, or of grand or petit larceny, the sentence of imprisonment to hard labour, either alone, or in addition to any other sentence which such court may lawfully pass on such persons, in such place and for such time as the Court shall direct.

no words can convey a more comprehensive power than these, authorising the trial of all such persons as are accused "of wilful murder, theft, robbery, RAPE, coining, or of having used any violence or committed any offence against the persons, or property, of any of His Majesty's subjects, or of any others entitled to His Majesty's protection," other than the foregoing crimes and offences may possibly come under the cognisance of a General Court Martial. But these will probably be, of so rare an occurrence that the adverting to them even in a summary manner cannot be requisite, and it would at the same time lead into a prolixity perfectly foreign to the plan of this work. Yet there is one question which deserves notice, which is, whether or not a General Court Martial, exercising jurisdiction under this article, can legally consider any charge which may be submitted to their investigation, not as a criminal offence but as an action personal or real, and, in consequence, instead of awarding punishment against the delinquent, adjudge him to pay damages to the party injured. It would, however, seem that, as this article in no way alters the 8th article of the 16th section, which orders that the Judge-Advocate shall prosecute in His Majesty's name, no action can be properly brought before a Court Martial; nor is it necessary, as most actions are also indictable offences. If, therefore, for instance,

an officer was accused of horsewhipping a person in a civil capacity, as this injury admits of two remedies either by action or indictment, I think that the Court Martial is bound to consider it in the latter point of view only, and that it is not competent for them in such a case to award damages. But should it appear from the circumstances of a case, that the facts proved do not amount to any offence which is punishable by the laws of England in any other way than by a pecuniary compensation to the party injured, a Court Martial might then perhaps be authorised in awarding damages, in order that justice might not suffer by the aggressor's escaping unpunished.

It need only be further observed, that, "in the English law, misdemeanor is generally used in contradistinction to felony; and misdemeanors comprehend all indictable offences which do not amount to felony; as perjury, battery, libel, conspiracies," &c. It is also held that every attempt to commit a felony is a misdemeanor; and in general an attempt to commit a misdemeanor is an offence of the same nature. So also an incitement or solicitation to commit a crime is a misdemeanor; as it has been decided by the Court of King's Bench that the bare solicitation to commit a crime is a misdemeanor, though the crime be not committed. But, though "*voluntas reputatur*

pro facto is still true, both in treason and misdemeanor, the intention in both must be manifested by an open act. Men cannot be punished by the law for the thoughts of the mind, however wicked they may be." *

The usual punishment of a misdemeanor is ~~fine~~ or imprisonment, or both.

It, however, deserves notice that to give full force and effect to all sentences of transportation awarded by General Courts Martial, and to pardons on condition of transportation, it is enacted by the ninth clause of the Annual Mutiny Act that "every person so ordered to be transported as aforesaid [by sentence of a General Court Martial or by His Majesty's extending his mercy on condition of transportation] shall be subject respectively to all and every the provision and provisions made by law and now in force concerning persons convicted of any crime and sentenced to be transported, or receiving His Majesty's pardon on condition of transportation." And by the 12th clause, with respect to India, it is provided that every such sentence of transportation, or pardon on condition of transportation, shall be notified by the officer commanding in chief to some judge of one of the supreme courts at Fort

* 4 Blackstone, 51 and 221. notes.

William, Port-Saint George, or Bombay, who shall make order for such transportation.

The most material legal provisions now in force respecting offenders ordered to be transported are, — that, if any offender so ordered to be transported shall return into Great Britain or Ireland before the end of his term, he shall be liable to be punished as a person attainted of felony without benefit of clergy, and execution shall be awarded against him accordingly. And if any felon or offender, ordered for transportation, or having agreed to transport himself on certain conditions either for life or for a certain number of years, shall be afterwards at large in any part of Great Britain or Ireland, without some lawful cause, before the expiration of his term, he shall be guilty of felony without benefit of clergy.*

* In applying the punishments above described, and in distinguishing between the common and statute law of England, attention should be paid to the following extract of a letter from the Judge-Advocate-General of His Majesty's forces to the Judge-Advocate-General of the Bombay army, dated November 15, 1821. The case referred to was that of a private of H. M.'s 65th regiment, who was tried in the Persian Gulf, by a General Court Martial, for murder, and, being convicted, was sentenced to transportation for life. — "With regard to the case of Private Brabazon, who was found guilty of murder, I adhere to the opinion I before expressed, that the sentence of transportation, which the Court

It will have no doubt occurred to the reader that these several crimes and offences, which I have arranged under this particular Article of War, are, with the exception of homicide, in most cases, continually taken cognisance of by Courts Martial, even in places where civil judicature is in force. But in such cases the charge preferred against the prisoner either is, or ought to be, for a military and not for a civil offence. For it must be obvious, that there is not an unlawful act, not capital, which either an officer or soldier can commit, but must be to the prejudice of good order and military discipline, and consequently an express, and not an implied, breach of the 2d article, 24th section, of the Articles of War. Even with regard to the only capital crime of which an

pronounced, is illegal. It is true, that the 39th and 40th Geo. 5. c. 79. s. 13., gives a *local* law to India, different from the law of England, and authorises the courts named in the section to apply that law to all cases within their jurisdiction. But the 4th article of the 24th section of the Articles of War applies to the army when serving out of the jurisdiction of the King's courts. And, in such cases, the instructions from the Commander-in-Chief, to which you refer, direct, that Courts Martial shall award such punishments only, both in kind and degree, as are known to the laws of England, and are applicable by the common or statute law. It follows, therefore, that as transportation is not applicable, by the laws of England, to the crime of murder, a Court Martial cannot legally award such a punishment."

officer is ever likely to be guilty, wilful murder in duelling, there are express Articles of War, on which both the officer and every person in any way accessory to the murder may be tried and punished. Nor does the conviction of an officer and soldier for circumstances which constitute a military offence, and which are at the same time connected with the commission of a civil crime, prevent his being afterwards indicted for that civil crime. As, for instance, a soldier is charged with theft, and in the commission of that theft he was absent from his quarters without leave. He may, no doubt, be tried by a Court Martial, for being absent from his quarters, and by the civil power for the theft. If, however, it be intended to deliver over an offender so circumstanced to the civil power, it would at all times be most consistent with equity and humanity not to try him for the military offence.

But it must be evident, that were soldiers to be always delivered over to the civil power for theft or other minor offences, or even for capital crimes, in cases where the proof is not sufficient to convict capitally, the discipline of the army would be most materially affected by the continual absence from their regiments of officers and soldiers, either as witnesses or prisoners; an absence which would often be indefinitely protracted on account

both of the distance and of the forms and dilatory proceedings of courts of law. It has, therefore, wisely become the custom of war in the like cases to try soldiers, except in cases of enormity, for the military and not for the civil offence; nor can any doubt arise as to the propriety of this mode, in consequence of the 1st article of the 10th section of the Articles of War, for that article merely requires that officers, *upon application duly made*, shall use their utmost endeavours to deliver over any person accused of an offence punishable by the known laws of the land to the civil power. In cases, therefore, where the civil power makes no such application, it is evidently left to commanding officers to determine, in their discretion; whether or not any officer or soldier charged with an offence punishable by the known laws of the land shall be delivered over to the civil power.

But it is to be most particularly observed, that every charge for such an offence, which is submitted to the investigation of a Court Martial, in places where civil judicature is in force, should clearly and distinctly specify the facts charged, in such a manner as will constitute a military offence. If, then, under such circumstances, a charge should be brought before a Court Martial accusing Lieut. A. B. of having killed Lieut. C. D. in a duel; or Private E. F. of having committed a robbery;

these charges being for capital crimes ought immediately to be thrown out by the Court, as not coming under their jurisdiction. But all that is requisite in order to render them cognisable by the Court is by framing them in this or a similar manner. Lieut. A. B. placed in arrest for unofficerlike conduct, in having challenged Lieut. C. D. to fight a duel. The subsequent meeting, and what took place on the ground, may, however, be given in evidence, as the best proof of the challenge having been given and accepted. Or, Private E. F. confined for highly irregular and unsoldierlike conduct, in having been absent without leave from his quarters, and in having at that time robbed Mr. G. H.; in which case the circumstances of the robbery can be only received as evidence of the irregular and unsoldierlike conduct. In these, and similar cases, it will be perfectly evident that neither the Commander-in-Chief who approves of such a charge, nor the Court who try it, in any respect whatever exceed the powers and jurisdiction vested in them.*

* It is scarcely necessary to observe, that, in these and similar cases, if a prisoner be found guilty of the charge, the Court Martial cannot award any of the punishments mentioned above, but merely such as are prescribed by any of the Articles of War, except the 4th article of the 24th section.

CHAP. XI.

REVISION AND APPROVAL.

REVISION. — In the 15th clause of the Annual Mutiny Act it is enacted, "that no sentence given by a Court Martial, and signed by the president thereof, shall be liable to be revised more than once." Such are the few words which vest in the Sovereign, or in commanders-in-chief to whom he may have been pleased to delegate it, the singular power of remitting to the members of a General Court Martial the sentence passed by them for further consideration. It is not, therefore, surprising, that officers should be at a loss to determine in what manner, and to what extent, a revision ought to take place. For writers on military law have either passed over this topic in silence, or have contented themselves with oraculously observing that it is a power of high expediency and good policy, and which has often been exercised to the most beneficial ends. Nor can a precedent be drawn from the practice of courts of law, because there is no other court in which the

sentence of the judge is subject to the approval or disapproval of any individual, however exalted.* To write, therefore, satisfactorily on this point is difficult, but it is necessary to make some remarks on a subject of so much importance.

It will, however, be sufficient to observe, that the doubts which arise at Courts Martial respecting the proper mode of revising a sentence proceed principally from the members not being aware of how far it is competent for them to correct any illegality in the original constitution of the Court, — or to amend or expunge any part of the proceedings already recorded, — or to enter into an examination of fresh evidence.

With regard to the first of these points, it is clearly established by law, that, if a court be illegally constituted, that court has no legal existence, and that, consequently, all its proceedings are null and void *ab initio*. If, therefore, a Court Martial has been sworn in by an improper oath †, or if an officer, to whom a legal challenge was made, has

* Even in naval Courts Martial, the sentence is definitive, and, as soon as it is decided upon, the Court is opened and the sentence read.

† As in the Indian army, the swearing in of a Court Martial holds for the trial of an officer or soldier in the Honorable Company's forces by the Annual Mutiny Act, instead of by stat. 27 Geo. 2.

been allowed to take his seat as a member, these illegalities cannot be corrected on a revision, but the whole proceedings must be quashed. The prisoner, however, may again be brought to trial on the same charge before a court legally constituted.

It is equally clear that, according to law, after the record of a judicial proceeding has been once made up, it cannot be in any manner altered, but additions may be made to it. It is, therefore, in strict conformity to this rule, that the original sentence of a Court Martial cannot, on a revision, be expunged, and that the revised sentence is merely added to the original record of the proceedings. But a doubt has arisen whether, if any irrelevant matter or illegal evidence has been admitted on the record, it is competent for a Court Martial to expunge such part of their proceedings previous to deliberating on their revised sentence. It is, however, evident that the expunging, altering, or otherwise amending any part of the proceedings cannot be legal, because it is decidedly contrary to the practice of all other courts of justice; nor is such a mode of revision sanctioned by the custom of war in the like cases. Aware, therefore, of the impropriety of proceeding in this manner, Courts Martial have sometimes, when irrelevant or illegal matter has been admitted on the record, confined

themselves to throwing such matter out of their consideration, and to declaring in their decision that they have, in consequence, found their revised verdict, and passed their revised sentence, without advert-^{ing} to it. But both the justice and the legality of this mode are very questionable. For, it is to be supposed that this matter is of importance, or otherwise a revision of the sentence would not have been ordered; and it may also be supposed that it has been adduced in support of the prosecution, as it would not probably have been noticed had it been in favour of the prisoner. If so, it is morally impossible that the members of the Court Martial can so exclude from their minds every impression and bias which this matter may have originally made, that it will not have some influence, to the prejudice of the prisoner, on their subsequent finding and sentence. Nor can this mode be deemed legal, for in no case, on criminal trials, can the cause, whatever errors may have taken place in the admission of evidence or otherwise, be remitted to the same jury after their verdict has been once recorded, in order that they may give another verdict in consequence of the errors so discovered. *

* In such cases, there is no other remedy but the discretion of the judge, who, in cases of felony, may grant a reprieve, in order that the case may be submitted to the Sovereign, and in misdemeanors may grant a new trial.

But the admission of such matter will not vitiate the proceeding; and it, therefore, remains with a commander-in-chief to determine, on a consideration of all the circumstances of the case, whether he will confirm the sentence passed by the Court Martial, or extend his pardon to the prisoner on account of the sentence being founded on irrelevant matter or illegal evidence. It is, however, to be remarked that, though there may have been an error in the admission of evidence, or an incompetent witness may have been examined, still, if the finding of the Court be agreeable to equity and justice, there are no sufficient grounds for the prisoner's expecting a pardon. It is only in cases where the finding of a Court Martial is founded on irrelevant matter; or is either not supported by or contrary to the evidence recorded, that a pardon may be reasonably expected.

With regard to the third point, as on all trials in criminal courts, as soon as the jury have found their verdict the trial is closed, and no farther evidence in the case can possibly be received; it might be concluded, without farther remark, that it is not competent for a Court Martial, on being ordered to revise its sentence, to enter into an examination of fresh evidence. But the case quoted by Teyler, in the 125th page of his work, and perhaps a very few similar cases that may have occurred

current, have occasioned doubts to be entertained respecting the justness of this conclusion. For it is said that, as the proceedings of Courts Martial are not complete nor finally closed until they have been confirmed by the proper authority, there can be no objection whatever to their receiving further evidence on revision. To which it may be replied, that, although the law requires that the sentences of Courts Martial shall receive such confirmation, it cannot be admitted, without some express provision, that it intended to introduce into military courts a practice contrary to that of every other court of justice. Were, also, the opinion now controverted to be acted upon, it would be tantamount to commencing the trial *de novo*, after the prisoner had disclosed the whole of his defence. For the Court could not legally prevent the witnesses produced on revision from being cross-examined, or having their characters impeached and re-established, or having the circumstances to which they might depose disproved by contrary evidence. But the illegality of such a mode of proceeding is too obvious to require any remark; and if, therefore, any instances of its having been adopted, can be adduced, they will be found to be far too few to admit of their being considered as sufficient precedents to sanction a practice which is so repugnant to every principle of law and equity.

But, if these observations be correct, it will follow that the revision of a sentence of a General Court-Martial ought not to be carried to any greater extent than a reconsideration of the proceedings originally recorded, and this is strictly consonant to the practice of courts of law. For if a judge be dissatisfied with the verdict of a jury, he may, and often does, direct them to reconsider it, at the same time pointing out to them any mistake which they may have made, in applying the evidence given to the facts in issue. It is, consequently, in reference to this practice that the words contained in this clause of the Mutiny Act ought to be understood, and not as conveying to Courts-Martial a power unknown to other courts of justice. Thus the Sovereign, or a commander-in-chief to whom he may have been pleased to delegate the power, in a similar manner directs a Court-Martial to reconsider its original opinion, and at the same time points out wherein he thinks the finding is at variance with the evidence recorded. The Court are, in consequence, bound to re-examine carefully and deliberately the grounds on which that finding rested; but they cannot alter, amend, or annul, in any manner, any part of the proceedings originally recorded, nor can they enter into an examination of fresh evidence. For it is not on any new matter that the revision is to depend, but on an

attentive reconsideration of the evidence already recorded on the proceedings.

A revision of a sentence may, also, be rendered necessary, in cases wherein the finding was perfectly correct, in consequence of the Court having awarded an exorbitant, an inadequate, or an illegal punishment; and whenever the finding is altered on revision, an alteration in the punishment originally awarded may likewise become requisite.

APPROVAL. — The revision of their sentence is the last act in a trial which a Court Martial may be called upon to perform. But their sentence, whether original or revised, is not final, nor does it become valid, until it receives the approval of the Sovereign, or of a commander-in-chief to whom this power has been delegated. From such approval, however, it does not follow that the punishment awarded by the Court Martial shall be actually carried into effect. For the Sovereign may either cause it to be put into execution, mitigate, or remit it; but he cannot substitute a different punishment for the one awarded by the Court, nor can he, in any respect, add to that punishment, nor even alter the particular manner in which the Court may have directed it to be car-

ried into effect. * But he may mitigate it, that is; if an officer has been adjudged to lose eight steps in his regiment, the Sovereign may command that he shall lose four steps only; and in the same manner, "a sentence of twelve months' solitary imprisonment, awarded against a soldier, may be reduced to six months.† The Sovereign may, also, remit the punishment altogether, by extending his pardon unconditionally to an offender; or he may extend his mercy upon what terms he pleases, and may annex to his bounty a condition

* Officers have been sometimes led into a mistake on this point, from the very erroneous application of the term *commutation of punishment*, to the mitigation, or conditional remission, of the punishment, which is strictly legal; but not even the Sovereign has the power of commuting a punishment, that is, changing it into another, which he might think more proportioned to the guilt of which a prisoner had been found culpable.

† Tytler, p. 135., misled by the practice of courts of law, seems to deny the Sovereign this power; but M'Arthur justly observes; "This mitigation may, on a superficial view, appear to be an alteration of the sentence. But when it is considered that it does not add to the judgment, and that it is a fundamental principle of the law of England, of which the martial is a branch, that a man cannot suffer more punishment than the law assigns, but that he may, ~~suffer less~~, the mitigation here alluded to, from a greater to a smaller punishment, exhibits, in a favourable point of view, that benign exercise of a royal clemency, with which by law His Majesty, as Chief Magistrate is fully vested." M'Arthur, vol. ii. p. 135.

either precedent or subsequent, on the performance whereof, the validity of the pardon will depend. Which prerogative is daily exerted in the pardon of felons, on condition of being confined to hard labour for a stated time, or of transportation to some foreign country for a term of years.* It is at the same time, enacted, by the 5th clause of the Annual Mutiny Act, that, in all cases wherein a capital punishment shall have been awarded by a Court Martial, it shall be lawful for His Majesty, instead of causing such sentence to be carried into execution, to order the offender to be transported as a felon for life, or for a certain term of years, as to His Majesty shall seem meet; “and if the person so transported, return from transportation before the expiration of the term limited,” and shall be duly convicted thereof, he shall suffer death as a felon, without benefit of clergy.

His Majesty, also, is pleased to vest, by the Royal Sign Manual, in all commanders in chief the power of causing to be put into execution, mitigating, or remitting, except in the case of commissioned officers convicted of capital crimes, or adjudged to be cashiered, the sentences of such General Courts Martial as are holden in the body

* 4 Blackstone, 40.

of forces under their respective commands. But by the words "mitigate or remit" the power of commutation is not conveyed; and though it may at first appear not a little inconsistent that the person who is thus authorised to confirm or remit a capital punishment should not also be empowered to change such punishment into a lesser one, still a material difference exists between these cases. For remission is not followed by the infliction of any pain or penalty; and in cases of mitigation the punishment inflicted is authorised, as far as it goes, by the sentence of a Court Martial. The exercise, also, of these powers is founded on mercy, and cannot be employed to the prejudice of others. But the power to commute necessarily implies the power of causing to be carried into effect an arbitrary punishment which has not previously received the sanction of any judicial tribunal; and such a power the Sovereign himself cannot exercise, except with the consent of the offender, or in cases provided for by the legislature.*

* I cannot venture to give any opinion respecting whether or not the Sovereign can delegate this last power. But, in case he can, the delegation of it ought to be most distinctly expressed, and the words *put in execution*, *mitigate*, and *remit*, employed in the usual warrants, are certainly not sufficient for this purpose.

Before closing these remarks it may be observed that they equally apply to Courts Martial, other than General Courts Martial, which ought to regulate their proceedings in every essential point exactly in the same manner as has been above detailed. The difference between them consisting merely in their constitution, and in several offences not being cognisable by the minor courts. For the Articles of War direct that no Regimental Detachment, or Garrison Court Martial, shall consist of less than five officers, excepting in cases where that number cannot be conveniently assembled, when three may be sufficient. But a difficulty has arisen respecting the rank which an officer ought to hold in order to admit of his being president of such a Court Martial, in consequence of this parenthesis (not being under the rank of a captain) which is so strangely inserted in the 20th article of the 16th section of the Articles of War. For the rank of the president is not prescribed in the 15th article of the same section, nor is it mentioned in any other Article of War; and in cases where a greater number than three officers cannot be conveniently assembled it would seem most probable that it would be equally difficult to find a captain to make the president of the Court. But whether this parenthesis ought to be considered as imperative on commanding officers, I cannot take upon myself to decide.

These minor Courts Martial may "inquire into such disputes or criminal matters as may come before them, and may inflict corporal or other punishments for small offences, and shall give judgment by the majority of voices." The president and members, and all witnesses who give evidence before the Court, are to be duly sworn, and the president is to administer the necessary oaths; there being no Judge-Advocate appointed to such Courts. It is to be observed, that no offence, the penalty of which in the Articles of War is death, can be taken cognizance of by these Courts; and, that His Majesty has directed that no corporal punishment which may be awarded by them shall exceed 300 lashes. What is intended by the words, in the Article of War just quoted, *other punishments*, I am not aware, because no minor Court can award any other punishments than flogging or imprisonment, or reducing to serve in the ranks, except in such cases as are especially provided for by the Articles of War.

It is to be remarked that, as these minor Courts Martial are instituted for the speedy trial of small offences only, and it being often necessary to assemble them in a single regiment, or even in a small detachment, the intention and object of them would be entirely defeated were challenges

to the members composing them admitted; and, in consequence, neither the prosecutor nor prisoner can except to any officer sitting as a member at a regimental, garrison, line, or detachment Court Martial.

CHAP. XII.

JUDGE-ADVOCATE.

As not only the regularity of the proceedings of Courts Martial but the preventing any unnecessary delay taking place on the trial must depend so materially on the Judge-Advocate, these remarks would not, perhaps, be deemed complete, did I not advert to the duties which he has to perform. But every requisite information on the subject has been already given by Adye and Tytler; and, as I can, therefore, add but little which is new, I shall avail myself of the observations of these authors, as far as I consider them correct. It, however, requires to be remarked, that these observations are principally founded on the supposition that the Judge-Advocate is prosecutor. But according to the present established custom of the army, this rarely now occurs; and it must at the same time be obvious, that the same general rules apply to a prosecution, whether conducted by the Judge-Advocate or by a private prosecutor. In many cases, too, the Judge-Advocate is an officer selected only for the particular occasion on which he is

employed, and he cannot, therefore, be supposed more qualified for the conducting a prosecution than any other officer. When, however, the Judge-Advocate holds his situation permanently, and has had an opportunity of acquiring a competent knowledge of its duties *, it will be evident that his experience will enable him to lay the case before the Court more pointedly, clearly, and unembarrassed with any extraneous and irrelevant matter, than it could be done by a person entirely unacquainted with the proceedings of a Court Martial.

The duty of a Judge-Advocate, previous to the assembly of the Court, is to summon the witnesses whose names may have been furnished him by the prosecutor or the prisoner, and it is the invariable practice to direct in the same general order in which the meeting of the Court is appointed, that lists of evidences shall be sent to the Judge-Advocate. If, however, either of the parties wish for the evidence of a person in a civil capacity, he may either summons him himself, or obtain a regular summons from the Judge-Advocate. But, as it has been before observed, no person in a civil capacity is obliged to attend any Court as a witness, unless his reasonable expences are ten-

* In the following remarks it is always such a Judge-Advocate that is intended.

dered him; and if, therefore, a party summons such a witness he must previously arrange for making this necessary tender. It is not requisite, as Tytler, misled by the practice of the Scottish law, has asserted, that the prisoner should be furnished with the names and designations of the witnesses on the part of the prosecution, nor the prosecutor with those on the part of the defence.* But it has become a general practice for the Judge-Advocate on the meeting of the Court to lay before them the lists of witnesses which he has received from the prosecutor and the prisoner; and they thus become equally known to the parties. Hence has arisen an opinion which is entertained by some officers, that the parties cannot produce at the trial any other witnesses than those whose names are contained in these lists. An opinion which is entirely erroneous, as these lists are merely called

* I have never understood it to be the duty of a Judge-Advocate, in all cases, to furnish a prisoner, previous to the trial, with the names and designations of the witnesses, by whose testimony any act objected against him is expected to be proved; nor, on the other hand, do I consider that it is requisite for the prisoner to furnish the Judge-Advocate with the names of any other witnesses than those whom he wishes to be officially summoned. I think such communication might possibly, in some instances, lead to inconvenience on either side. Sir Charles Morgan's remarks, advertisement to James's edition of Tytler, p. xiii.

for, in order to ensure the attendance of the military witnesses, and to provide for the regular performance of duty in their respective corps and departments, during their absence at the Court Martial. They also obviate the inconvenience which results from a witness being a member of the Court. But they in no manner preclude either of the parties from producing, as long as his case remains unclosed, such witnesses as he may think necessary. For although these witnesses may have been in court during all the preceding part of the trial, the Court cannot legally refuse to receive their evidence. As this, however, infringes on the established mode of examining witnesses at Courts Martial out of the hearing of each other, such evidence loses much of the weight to which it would have been otherwise entitled, and it is, therefore, most expedient in all cases that the lists of witnesses furnished to the Judge-Advocate should contain the names of every witness whom the parties intend to call.

When the Court has assembled on the day appointed and all the members are present, the

* For it is no sooner known that an officer ordered on the Court Martial is required as a witness, than he is relieved from the duty; and it is thus that a prisoner frequently prevents an officer, to whom he has objections from sitting on his Court Martial, by including his name in the list of evidence.

Judge-Advocate calls over their names in order that they may take their seats according to their seniority. He then reads the warrant appointing, the president, and the one appointing himself to act as Judge-Advocate. He next asks the prisoner if he has any exceptions to the members; and if he has none, or as soon as the exceptions offered are disposed of, the Judge-Advocate proceeds to swear in the president and members, and is himself sworn in by the president. He then reads the charge, and if no objections be made to it, he asks the prisoner, "How say you, Lieut. A. B. are you guilty of the charge just read or not guilty?" and records his answer. The Court being thus duly constituted and the prisoner arraigned, the Judge-Advocate directs all persons summoned as witnesses to withdraw, and the trial proceeds.

If the Judge-Advocate be prosecutor the path before him is plain and easy. But if he be not, he has a duty of the greatest delicacy to perform, and in the discharge of which he will be liable to expose himself either to the reproaches of his own conscience, or to the invidious remarks of the Court and the parties on the trial. For, although circumstances may render it advisable that a prosecution should be conducted by a private prosecutor, it is still universally admitted that he thereby sustains this character in conjunction with

the Judge-Advocate, who, in consequence, has liberty to put such questions as he may think necessary to the different witnesses who are examined. It is, also, for the same reason, that the questions of a Judge-Advocate should always follow, or supply the place of those of the prosecutor, as forming, in fact, but one and the same examination. Nor should the Judge-Advocate be permitted to examine in chief* a witness after he has been cross-examined by the prisoner, because this might tend to invalidate materially whatever might have appeared in favour of the prisoner on the cross-examination. But the difficult point for a Judge-Advocate to decide is, how far he ought to take a part in the prosecution. He is aware, that a strong prejudice in favour of the prisoner, in general prevails at Courts-Martial, and should he then put questions, omitted by the prosecutor, which too evidently tend to establish the guilt of the prisoner, he cannot expect to escape many a disagreeable remark. But in order to avoid such remarks, can he reconcile it to his own sense of duty, to allow the prosecution to fail, in conse-

* He is, of course, at liberty to re-examine into any new matter which may have arisen in the course of the cross-examination, and as a private prosecutor is seldom aware of the nature of a re-examination, the Judge-Advocate may in this point materially assist him.

quence of the unintentional error of the ipso-
cretory when it might be in his power to prevent
it. The decision must be left to the breast of the
Judge-Advocate. But it may be observed, that he
is bound to prosecute all offenders, and that no
one ought to undertake the stern duties of a public
prosecutor, unless he is prepared to repress every
dictate of compassion, and every feeling that might
mislead, and to contemn every reproach, except
that of his own conscience.

Let me not, however, be understood as being of
opinion that a Judge-Advocate ought to avail
himself of any advantage which his superior know-
ledge or ability, or his influence with the Court,
may give him, in enforcing the conviction rather
than the acquittal of the prisoner. For I perfectly
agree with Adye, "that impartiality, which is
necessary in every member of a Court Martial, is
peculiarly so in the Judge-Advocate; who should
be particularly careful not to let one part of his
business prejudice him in the conducting of
another, nor lead him to endeavour to bias the
Court by any ambiguous explanation of the law or
other matters. Truth and equity should be most
conspicuously seen at all Courts Martial, but
chicanery never permitted to enter the door. The
Judge-Advocate being prosecutor for the Crown,
must not induce him to omit any thing on the

records of the Court that may be of service to the prisoner; neither is he, on the other hand, to let his master's cause suffer, and a criminal escape unpunished, through lenity or any other motive whatever. But in the prosecution, though he should act with spirit and resolution against daring and hardened offenders, yet he ought to be cautious not to injure or oppress, and much more not to add insult to severity. In all cases, where misfortune is interwoven with guilt, he should make it appear that a detestation of the crime, and a regard to the public safety and service, are not inconsistent with pity to the man, particularly to offenders for the first time; to such whose crimes are small, whose temptations were powerful, and who appear to have been seduced by others.” *

“ Another important duty of the Judge-Advocate during the trial is the instructing or counselling the Court, not only in matters of essential and necessary form, with which he must be presumed to be from practice thoroughly acquainted, but in explaining to them such points of law as may occur in the course of their proceedings. For which purpose a Judge-Advocate ought to instruct himself in the general principles and rules of law, and in the practice of criminal Courts.” “ In the

* Adee's Treatise on Courts Martial, p. 114.

performance of this duty, the Judge-Advocate will always be guided by a just sense of his official character and situation. As he has no judicial power, nor any determinative voice, either in the sentences or interlocutory* opinions of the Court, so he is not entitled to regulate or dictate those sentences or opinions, or in any shape to interfere in the proceedings of the Court, further than by the giving of counsel or advice; and his own discretion must be his sole director in suggesting when that may be seasonable, proper, or necessary. On every occasion when the Court demands his opinion he is bound to give it with freedom and amplitude; and even when not requested to deliver his sentiments, his duty requires that he should put the Court upon their guard against every deviation either from any essential or necessary forms in their proceedings, or a violation of material justice, in their final sentence and judgment. A remonstrance of this nature, urged with due temperance and respect, will seldom, it is to be presumed, fail to meet with its proper regard from the Court; but should it happen that an illegal measure or an unjust opinion is nevertheless persevered in, the Judge-Advocate, though not

* This law term means nothing more than the occasional decisions of the Court on questions which arise in the course of the trial.

permitted to enter his dissent in the form of a protest upon the record of the proceedings (for that implies a judicative voice) ought to insert therein the opinion delivered by him upon the controverted point, in order not only that he may stand absolved from all imputation of failure in his duty of giving counsel, but that the error or wrong may be fairly brought under the consideration of the power with whom it lies in the last resort, either to approve and order into effect, or to remit the operation of the sentence.

There, is however, in the performance of this part of a Judge-Advocate's duty, a point of considerable delicacy, which is, how he ought to act while the Court are deliberating on their Finding and Sentence? For I have heard this opinion (published to the army of Bengal by the Marquis of Cornwallis, when commander-in-chief in India,) more than once quoted at Courts Martial; and it certainly is an opinion entertained by several officers. "As the Judge-Advocate does not sit in a judicial capacity, and has no share of responsibility in the sentence of a Court Martial, he has a very delicate part to act, and ought not on any account to deliver his opinion on the credibility of the evidence, or on the guilt or innocence of the

It is in *Tyler's Essay on Military Law*, p. 359, *et. seq.*

accused, but should deliver it entirely between the members, who are alone accountable for passing sentence according to the dictates of their own conscience and judgment." Most fully concurring in the latter part of this opinion, I cannot but think that the first part of it is erroneous. For if the Judge Advocate is to be considered as the law officer of the Court, he is undoubtedly the person most qualified to judge of the credibility of evidence, and, as he has had, from acting as registrar to the Court, an opportunity of becoming more fully acquainted with the evidence recorded, than it can be expected that any member should have done, he is also best qualified to point out in what manner the evidence applies to the facts in issue. If, therefore, he should observe that the Court were in his opinion likely to find a verdict inconsistent with the evidence, he is certainly bound to lay before them his sentiments on the subject. But when the Court are passing sentence there can be no doubt that the Judge Advocate ought not then to interpose his opinion; for though he has evidently a very considerable share of responsibility in the finding of the Court, he has not the slightest in the punishment which may be awarded; except in cases where he thinks that a particular Article of War applies to the offence of which the prisoner has been found guilty. In such a case it is his duty to point out the particular article to

the Court, on any question arising respecting its applicability to the offence charged, it will not, I think, be disputed that the Judge-Advocate ought to deliver his sentiments on such an occasion. As the Judge-Advocate may, also, be supposed to possess more experience in the proceedings of Courts Martial than any of the members, there can be no impropriety in his pointing out, after sentence has been passed, any irregularity or illegality which may have taken place in the punishment awarded.

In general, then, a Judge-Advocate should refrain from interposing his opinion, unless it is requested by the Court, or some irregularity is likely to occur in the proceedings, or a question of importance arises, to the proper decision of which he may think that the expression of his sentiments might contribute. In all which cases the good sense and discretion of a Judge-Advocate can be his only guides. But it may be observed that he ought never to deliver his opinion in a dictatorial manner, but rather to suggest or insinuate the advice which he may wish to be adopted, and though he ought at all times to deliver his sentiments with firmness and freedom, it would be better that he avoided the amplitude which is recommended by Tytler. His opinions, on the contrary, ought to be given in as few words as

possible, and supported by the most forcible arguments only, expressed in an equally concise manner; for prolix discussions and long arguments, many of them, perhaps, very little to the point, instead of enlightening the Court, or being of any advantage whatever, merely produce weariness and inattention.

Another duty of the Judge-Advocate during the trial, is to take down the proceedings in writing; and, although this may appear to be of little importance, still the correctness of the proceedings and the expediting of the trial, depend materially on the quickness and precision with which a Judge-Advocate performs this seemingly unimportant duty. When, therefore, a witness is called into Court, the Judge-Advocate first administers the oath to him upon the holy Evangelists to declare the truth, the whole truth, and nothing but the truth; and then reads the charges to him. * The Judge-Advocate next proceeds to put the several questions to the witness, which are always to be read before they are recorded, in order that the opposite party or

* If there are several charges or instances of a charge, and the witness is only called to depose to some particular one, it is only necessary to read that charge or instance. If, also, the charges are very long, it is sufficient to read an abstract of them, as was the case at Lieut. General Whitelocke's trial.

the Court may object to any one which they deem either improper, and takes down in writing the respective answers. The testimony of each witness is to be separately and distinctly recorded on the proceedings in this manner. "Lieut. A. B., of the ——— battalion regiment of infantry, called into court and duly sworn;" and when his evidence is finished, an entry to this effect is to be made in the proceedings: "The witness, Lieutenant A. B., withdrew." The evidence is most usually taken down in the way of question and answer, and on recording each interrogatory, the party who puts it should be distinctly denoted: as, "Q. by the prosecutor," "Q. by the Judge-Advocate." "Q. by the prisoner." "Q. by the Court." Sometimes, however, a witness gives his testimony in the way of narrative, in which manner it must likewise be taken down in writing, the Judge-Advocate adhering, as nearly as possible, to the very words of the witness.

At the close of the business of each day, and in the interval before the next meeting of the Court, it is the duty of the Judge-Advocate to make a fair copy of the proceedings, which he continues thus regularly to copy, to the conclusion of the trial, when the whole is read over by him to the Court, before the members proceed to deliberate and form their opinions. The finding

and sentences of the Court are always embodied in the proceedings; in the Judge-Advocate's own handwriting.

Such are the only duties connected with a trial, which a Judge-Advocate has to perform. But an opinion very generally prevails, that it is also his duty to assist the prisoner in his defence; and it is even said, that though the prisoner should not request it, the Judge-Advocate is bound to offer him this assistance. The opinion seems to rest entirely on the authority of Tytler, for Adye, Sullivan, and M'Arthur, support the opposite side of the question. Tytler, however, asserts that it is the official duty of a Judge-Advocate sanctioned by established and general practice, to assist the prisoner in the conduct of his defence: to do justice to his cause by giving its full weight to every circumstance or argument in his favor, and by bringing the same fairly and completely into the view of the Court; and to suggest the supplying of all omissions in the leading of exculpatory evidence. But Tytler, at the very same time that he makes these observations, most completely invalidates them. For he himself admits that all that is required is, that, "in the same manner as in the Civil Courts of criminal jurisdiction, the Judges are understood to be of counsel with the person accused; the Judge-Advocate; in

Courts-Martial, shall do justice to the cause of the prisoner." For I have had before occasion to observe, that the maxim that the Judge is counsel for the prisoner, signifies nothing more than that the Judge shall take care that the prisoner does not suffer for want of counsel. The Judge is counsel only for public justice, and to promote that object alone; all his enquiries and attention ought to be directed. But as it is very rarely that a prisoner is entirely innocent, it cannot be said that the supplying all omissions in the leading of his exculpatory evidence, can promote the ends of justice; for, on the contrary, it must evidently tend to defeat them; and it cannot, therefore, be the duty of either a Judge, or a Judge-Advocate, to furnish a prisoner with the means of escaping the punishment which he deserves.

The remarks of Adye on this point are perfectly correct: — "It seems also to be generally expected that the Judge-Advocate should assist the prisoner in his defence. This last part of his duty (if it really is a part thereof) must have arisen merely from custom, for I know of no authority for it, in either the Mutiny Act or Articles of War; nor is it a part of the instructions usually given from the crown to Judge-Advocates, neither can I discover any example of a similar nature in the courts of common law, on which it can be founded. If it

takes its rise from the rule, that the Judges are always to be of counsel with the prisoner, to see that he has law and justice; this assistance should rather come from the members of the Court-Martial who are, in fact, his judges. I would not, however, be understood to insinuate, that the Judge-Advocate should totally deny the prisoner his assistance, and thereby take every advantage of the superior knowledge he may be generally supposed to possess in matters of this nature; particularly on the trial of common soldiers, and such who may endanger their cause, merely from want of ability and knowledge, how to defend themselves: should any points of law or doubt arise, the members as well for their own satisfaction, as to do justice to the prisoner, have a right to call upon the Judge-Advocate for information; neither does it seem incompatible with the other parts of his duty that he should assist a prisoner, (particularly one under the circumstances just mentioned,) by pointing out to him the proper mode of supporting his cause and making his defence; but that he shall first prosecute the prisoner, and then, Proteus-like, change sides, and furnish him with means and arguments to overthrow those he has before made use of, on the part of the crown, seems inconsistent with justice and common sense. *

* Adye on Courts Martial, p. 112.

It may, however, be said, that although it should not be expected that the Judge-Advocate when prosecutor should assist the prisoner in his defence, still, in all cases where the prosecution is conducted by a private prosecutor, the Judge-Advocate ought then to furnish that assistance. But the question is not respecting the propriety of this assistance, but whether or not it is positively a part of the official duty of the Judge-Advocate. That this last position, however, cannot be maintained is probably fully evinced by the preceding remarks, and it will, therefore, follow, that if a prisoner wish for such assistance, he ought to request it, and not the Judge-Advocate to offer it. Nor can there be any impropriety in the Judge-Advocate *out of court* pointing out to a prisoner the manner in which he might best conduct his defence, or even to making the written defence for him. But *in court* he should not for a moment forget his duty as prosecutor, and though he ought then as well as at all other times to restrain the prisoner from advancing any thing which might criminate himself, he is still bound, by the cross-examination of the prisoner's witnesses, and any other means in his power, to give every effect to the prosecution. It must, therefore, be evident, that it is out of the power of the Judge-Advocate to give the prisoner any effectual assistance, for *in court* he can neither advise him nor frame questions for him, nor assist him

in the cross-examination of the prosecutor's witnesses; and these acts alone could be of any essential benefit to a prisoner. Prisoners themselves seem to be fully aware of this, as they very seldom request the Judge-Advocate's assistance, nor can it in general be necessary as they are always, on application to the Court, allowed the aid either of counsel or of a friend.

Another singular passage in Tytler's work is thus very justly remarked upon by Sir Charles Morgan:—"I must confess that I am decidedly of a different opinion from Mr. Tytler, with regard to the propriety or expediency of the Judge-Advocate in his character of prosecutor, having a personal conference with the person to be tried, and learning the scope of his defence. I hope I have not been inattentive to compressing the proceedings of Courts Martial as much as justice would permit, and have been careful that prisoners should experience liberal treatment, so that nothing be brought against them by surprise; but I have ever declined, as far as might consist with the conduct of a gentleman, any personal conference, and have rather avoided, than courted, an anticipation of the prisoner's defence." * The reasons given in support of his opinion by Tytler are—"That it has sometimes happened, that by a timely explanation

and Advertisement to James's edition of Tytler, p. 13.

in such previous conference, circumstances of the charge, apparently the most unfavourable, have been alleviated or done away, and even the necessity of the trial altogether superseded, by the anticipation which such a conference afforded, of a judgment of acquittal from the chief matters of accusation." But in a preceding passage he has very correctly observed, "It is understood to be consonant to military law and practice, that in cases of much importance, and where the facts are various and complicated, or there appears ground for suspecting the just foundation of the charges of criminality, or where a crime has been committed, or much blame incurred without any certainty on whom it ought to attach, a previous Court of Enquiry should take the matters under their consideration, and determine on such evidence as can be brought them, whether there is or is not sufficient cause for bringing particular persons to trial for the offence or crime, before a General Court Martial." The objects, therefore, to be gained by a personal conference between the Judge-Advocate and prisoner before the trial, may be equally attained, and in a much more regular and usual manner, by a previous Court of Enquiry.

CHAP. XIII.*

REMARKS ON CAPTAIN HOUGH'S "CASE BOOK OF COURTS MARTIAL."

Not having had an opportunity of perusing Captain Hough's "Case Book of Courts Martial," previous to the composition of the preceding pages, I have been prevented from before noticing a few opinions advanced by Captain Hough, which appear to me to be erroneous. But as they tend to controvert some of the principles contained in this work, I find myself obliged to advert to them in this formal manner, and at considerable length. If, however, further certainty in the practice of military law should be the result, this discussion will not be altogether useless.

There seems, at the same time, to be one obvious objection to all works, similar to those of

* Although this chapter appears to relate to a local subject of no interest, yet it has afforded me an opportunity of discussing several material points of military law at greater length than was consistent with the plan of the preceding pages. I have, therefore, allowed it to remain, as it is of so miscellaneous a nature, in the same form in which it was originally written.

Major James, and Captain Hough; for they merely exhibit the decisions of Courts Martial, and do not explain the grounds on which these decisions rested. Nor is this defect, in general, supplied by the remarks of commanders-in-chief, who seldom consider it necessary to state the particular circumstances of a case. It is impossible, therefore, that such decisions can in any respect serve as precedents; because charges for the same offence must be worded in nearly the same manner, but the evidence adduced in support of the charge will probably vary in kind and degree on each trial, and the opinion of the Court must consequently conform to the proof adduced. But it is not customary to state in this opinion the causes which influenced the Court in determining the precise degree of culpability of which a prisoner is found guilty. Hence, without any reason being assigned, an officer, convicted of *conduct unbecoming the character of an officer and a gentleman*, is by one sentence adjudged to be reprimanded, and by another to be cashiered; and a soldier convicted of *mutiny*, is subjected to 500 lashes, six months' solitary confinement, or death; and for *desertion*, to 500 lashes, three months solitary confinement, or transportation for life, or for a term of years.

These works seem to have been undertaken under the supposition that they might be of the

quite met as the Year Books and Term Reports of courts of law. But in the latter every case reported, however concisely, contains, besides the opinion of the judge, a statement of the circumstances, and also the chief arguments of counsel *pro* and *contra*; so that the reader can never be at a loss in ascertaining how far the precedent might apply in other cases. The sentences of Courts Martial, on the contrary, contain no such details, and a collection of them must therefore tend rather to embarrass than to facilitate the practice of military law. Nor can they be considered of any authority, for, unless the circumstances of any two cases be precisely similar, the decision of the one ought not to be a rule or precedent for the decision of the other; and on this indispensable point such case books of Courts Martial, *ex natura rei*, can never afford any information.*

As the plan of Captain Hough's work is more adapted for reference than discussion, it will be, perhaps, best to observe, in the following remarks,

* If, however, besides the charge and sentence, the evidence adduced by the parties was concisely stated, and any points of importance that might have arisen in the course of the trial, were also noticed, a case book would be of the greatest use. The remarks of His Majesty, and of commanders-in-chief, likewise, often contain new and valuable information.

the same arrangement that has been adopted in the preceding pages.

AUTHORITY OF COURTS MARTIAL. — Captain Hough, following Mr. Samuel, has agitated a question of some delicacy with respect to the operative effect of the 23d article, 16th section, of the Articles of War; but for the decision of which any elaborate argument could not, I conceive, be at all requisite. For it is self-evident that, as there is no clause in the Mutiny Act corresponding with this Article of War, it cannot, according to the 1st and 35th clauses of this Act, apply to any other than military persons. If, therefore, a person not military acts unbecomingly in a Court Martial, all that can be done is for the President to direct him to be turned out; or if his conduct were particularly offensive he might be delivered into the custody of a peace officer, in order to be prosecuted in due form of law, for a highly aggravated breach of the peace. But in places where no form of civil judicature is in force, it is equally obvious, that as Courts Martial then become vested with the authority of courts of law, it would be fully competent for them to punish such conduct in the same summary manner that contempts of court are punished by the King's Bench.

With respect, however, to military persons, this article fully empowers Courts Martial to inflict

on them a summary punishment, that is, without trial, for all improper behaviour committed in their presence. But as such punishment ought to be moderate, it necessarily becomes requisite where the offence is of a serious nature for the Court to refrain from punishing summarily, and to direct a charge to be exhibited against the offender.

CUSTOM OF WAR. — Captain Hough observes, p. 308., "The custom of war in the like cases must, I should conceive, mean the custom at the time, and that the general and not any particular custom (for there may be several customs)." What this remark can mean it is impossible to understand. For nothing can be considered a custom except such a form of proceeding as has been established by long and uniform precedent and usage. Blackstone lays it down that "it is an established rule to abide by former precedents where the same points come again into litigation; as well to keep the scale of justice even and steady, and not to be liable to waver with every new judge's opinion; as also because the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from, according

to his private sentiments; he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one."

Captain Hough has evidently attached too much importance to Mr. Samuel's work; for this writer seems to have no practical knowledge of military law and the custom of war in like cases, and his opinions, in consequence, are too frequently erroneous, and merely calculated to excite doubts and difficulties with respect to points on which none can reasonably exist. For instance, with respect to the 11th article, 4th section, of the Articles of War, Mr. Samuel remarks, that "it purports to relate to *violence* to the *person* of the individuals specified, and no other sort of injury. If any other species of violence should be thought to be intended, it is at least not to be gathered from the article itself." — "For the members of a Court Martial, though they may call in the custom of war to their aid, according to the oath administered to them respectively, if any doubt shall arise, to

1 Blackstone, 68, 69. This quotation is particularly deserving the attention of members of Courts Martial; for a constant adherence to the principles laid down in it would soon give a fixedness and certainty to military law, which, it must be confessed, it does not at present possess.

assist or confirm their judgment, they cannot report to such custom, where the letter of the article is plain, and where no doubt appears upon the face of it, but is raised, if raised at all, by some external circumstance." Fully concurring in the justness of the last remark, I cannot but regret that it should be so misapplied; for a reference to this article will show that Mr. Samuel's reasoning cannot possibly apply to it. The words are "*whatsoever officer, non-commissioned officer, or soldier, shall do violence to ANY PERSON WHO BRINGS provisions,*" &c.; in which the word *person* is most obviously used in its legal sense, so as to comprise under it man, woman, or child, and in which it as certainly does not mean the mere *body* of the bringers. Nor can there be to plain understandings any word so completely devoid of all ambiguity as *violence*, which even legally would include all acts by which the persons bringing provisions were assaulted or personally injured, or their property or chastity forcibly taken from them. It seems, also, obvious, that the intention of the framer of this article was to place under its protection all persons who frequented a camp, garrison, or quarters in foreign parts for the purpose of supplying it with provisions, and that this object could not be attained, if the bringers of supplies were not certain of protection in going and coming, and in performing every act connected with the sale of their

supplies. A proficient in legal distinctions might, however, perhaps succeed in showing that the word *brings* cannot, according to the strict letter of the law, be understood in so extensive a signification; but the obvious intent of this article, so indispensable for ensuring the subsistence of an army, and its having been immemorially interpreted in this manner would, most indisputably, be held a sufficient authority for any sentence passed by a General Court Martial, in conformity to this received custom and usage.

CHALLENGES.—Captain Hough remarks, p. 748., that “the member (challenged) does not withdraw till the Court admit the objection, for the Court is not duly constituted if any member be absent.” I do not know on what authority, as none is quoted, this opinion rests; and I have always understood it to be the established practice for the member challenged to withdraw, while the Court is deliberating on the validity of the cause assigned.* Nor is a Court Martial duly constituted until it is sworn in; and Captain Hough himself admits that challenges must be made previous to the oath being administered to the

* Challenges very seldom occur, as they are, in general, obviated before the Court meets. But at three Courts Martial, at which I have been present, the member challenged withdrew.

members. The question, therefore, merely is, whether the officers assembled for the purpose of forming the Court, or any part of them, can exercise any functions before they are duly invested with full powers by having taken the prescribed oath.

The decision of this question is embarrassed by the two distinct characters of *judges* and *jurors*; in which members of Courts Martial act. For there is no other legal Court in which *judges* are appointed *pro hac vice*, and whenever, therefore, a Court meets, there is a *judge* to preside, who is not liable to be challenged. But it is, at the same time, required by law that all challenges to a *juror* shall be made when he comes to the book, and before he is actually sworn. This practice military courts have adopted, and, consequently, the only doubt that can arise is with respect to the manner in which the place of the judge ought to be supplied. For in courts of law, on a challenge for cause shown, "the validity of it must be left to the determination of *triors*, whose office it is to decide whether the juror be favourable or unfavourable. The *triors*, in case the first man (juryman) called be challenged, are two indifferent persons named by the Court; and if they try one man and find him indifferent he shall be sworn; and then he and the two *triors* shall try the next; and when

another is found indifferent and sworn, the two *triors* shall be superseded, and the two first sworn on the jury shall try the rest."*

From this quotation it appears evident, that a juror cannot give an opinion on the validity of a challenge made to himself, and, consequently, that Captain Hough is incorrect in stating that "the member objected to has a right to vote on such objection." It will also show that the practice of Courts Martial assimilates, as much as the nature of things will admit, to that of courts of law. For there being no court by whom indifferent persons to act as *triors* could be named, nothing can be more unexceptionable than that all the officers assembled to form the Court, to whom no objection is made, should act as such; and the only question that can remain is whether or not the same oath should be administered to them as there is to *triors*. As, however, the cause of challenge is scarcely ever contested, it being either a matter of notoriety, or immediately admitted by the officer challenged, or of a nature which the Court avoids enquiring into, it is, consequently, of little importance whether the opinion of the Court is given, in this instance, under the sanction of an oath or not.†

* 3 Blackstone, 362, 363.

† But by what authority or by whom could an oath under such circumstances be administered? The order, also, ad-

But if the member excepted to cannot give an opinion on the validity of the objection, made to himself, his presence in court during deliberation would be irregular. For though the Court Martial is not duly constituted until it is sworn in, still the immemorial custom of deliberating in closed court must be adopted by the officers thus acting as *triers*, and all other persons must be excluded. It must, also, be obvious that the withdrawing of the member challenged is, amongst officers and gentlemen, essential to the freedom of discussion; for delicacy, were he present, might prevent the expression of opinions material to the proper decision of the subject.

CHARGES. — Captain Hough observes, p. 742, "I'll finally approved of, or, indeed, if before the prosecution has commenced, I should think if any

pointing these officers members of the Court Martial, vests them, according to military usage, with a certain character, though unsworn, in the same manner as members of Courts of Inquiry, who do not take any oath.

A question may, in consequence, arise respecting whether or not, in case the cause of challenge is disputed, these officers can examine witnesses to the point on oath. I am not certain that there is any established custom in this respect, and even if any precedents could be produced, I doubt whether they would be held legally sufficient to warrant the administering of an oath by persons not duly authorized.

illegality in the charges or mode of procedure was found to exist, it would be the duty of the Court to stay their proceedings; and that the prisoner would be allowed time to meet any new matter that might be introduced." I do not exactly understand this remark, particularly the last sentence. For, in courts of law, until the jury is sworn and charged with the prisoner, he has not, properly speaking, been placed on his trial. But as this cannot take place at Courts Martial, the prisoner's pleading over to the charge may be considered as equivalent; and, consequently, all informalities in the proceedings or errors in the charge may be rectified and amended previous to his so pleading. It has, also, been shown, in p. 21., that it is the duty of the Court, before entering on the trial, to satisfy themselves with respect to their jurisdiction in the particular case, and to reject or direct to be amended any improper or irrelevant charge, or part of a charge. But after the prisoner has pleaded over, it is not competent for any authority to make any alteration in the charge, or to adduce new matter against the prisoner. For the Court are then bound by their oath to try *and determine, according to the evidence, in the matter now before them*; which matter is most indisputably the specific charge or charges to which the prisoner has just pleaded.

unnecessary to . . . Captain Hough has most un-
 accountably quoted contradictory
 authorities, without attempting to
 reconcile them, or giving any
 opinion with respect to the one which ought to be
 preferred.* His work, therefore, must occasion
 much perplexity to those who read it with atten-
 tion, and to those who read it superficially it will
 afford argument and authority for maintaining the
 most opposite opinions. For instance, in p. 581.,
 he quotes this remark of Mr. Samuel; "When an
 offence is of that specific quality, as to be reducible
 to a particular Article of War to which a known
 and distinct penalty is attached, it must be pro-
 secuted under such article, that the plain intent of
 the law and the purposes of justice may be fully
 answered." But in p. 411. he quotes this opinion
 of the Marquis of Hastings: "If the prisoner
 has incurred the guilt of mutiny, he must have
 been guilty of riotous conduct, because it is an
 inseparable ingredient in the greater crime; and
 it lies in the discretion of the commanding officer

* That part of his work particularly which is placed under
 the 30th article, 16th section, of the Articles of War, is a sin-
 gular instance of contradictory arguments and apparently con-
 flicting authorities. But it is impossible to imagine what ad-
 vantage was contemplated in submitting to the perusal of young
 officers remarks which may mislead, but cannot instruct, and
 the pernicious tendency of which must be so very obvious.

what may be the amount of example necessary for the preservation of discipline, by which view he will be guided in framing the extent of the accusation. The Court, therefore, acts consonantly to its oath in deciding the existence or non-existence of criminality on the scale which has by due authority been submitted to its judgment, although it may surmise the transgression to be of heavier stamp. No question has ever been thrown on the propriety of trying deserters (except in aggravated cases) for absenting themselves instead of charging them with desertion, in order that the fault may be corrected by a moderate infliction. This is in exact accordance with the practice of British courts of justice, where indictments are continually preferred in terms which shall reach only a minor shade of an offence otherwise capital, so that chastisement may visit crime without being carried to what would be in the special case an objectionable extremity." Any remark must be superfluous to show that this last opinion is founded on the most indisputable principles of law both criminal and military.

ADDITION OF NEW MEMBERS.—Captain Hough has too frequently quoted opinions without considering whether or not they were in conformity to either the letter or the spirit of military law, or to the established practice of Courts Martial. It

is, therefore, difficult to controvert such remarks without entering into some prolixity, in order to evince the erroneousness of the opinion objected to. On this point he merely quotes M'Arthur, who has observed, that "the addition of new members would under any circumstances be a very hazardous precedent, perhaps *absolutely illegal*." But Captain Hough has not remarked that the very authority, on which M'Arthur's observation rests, the opinion of the Advocate-General and Solicitor of the Admiralty, virtually admits that the addition of new members would *not be illegal*. For their words are, "The addition of new members will not be proper, unless such persons should hear or be well informed of the evidence given before their attendance." *

The practice, however, which has been for many years adopted of appointing more than the legal number of members, might seem to show that some doubts exist with respect to the legality of adding new members to a Court-Martial; but this precaution may also have originated in a wish to obviate the interruption and delay which their addition must always occasion. The earliest writer on military law, who notices this point, is Aylmer, and his opinion coincides with that of the

* M'Arthur, vol. i. p. 352.

authority quoted by Mr Arthur, which last is dated September the 6th, 1745. The long prevalence, therefore, of this opinion, as it has never been declared to be illegal by any competent authority, would alone be sufficient to give it the force of custom. But it rests, also, on the most obvious reasons of expediency; for in the field or in places where there are few officers, Courts Martial might become reduced below the legal number of members, and it might be extremely inconvenient, or even impossible to assemble an entirely new court. In such a case does justice require that an offender, perhaps, accused of mutiny, murder, or some other heinous crime, should escape unpunished, or that forms, adopted in situations where they could always be acted upon without defeating the ends of justice, should give way to the best means of promoting them?

The only apparent legal objection to this mode of proceeding, arises again from the twofold character of members of Courts Martial; for jurors cannot be renewed during a trial, and there is, perhaps, no instance of the judge becoming incapacitated on such an occasion. But in courts of law the proceedings are not recorded, nor do adjournments take place, and it is, therefore, indispensable, that each trial should be finished at one sitting. At Courts Martial, on the contrary, the

proceedings are carefully recorded, and adjournments take place from day to day, or for a longer period. In case, also, of a juror being obliged to withdraw, no inconvenience occurs in empanelling a new jury, and putting the prisoner again on his trial. But Courts Martial are often held under circumstances and in situations where the protraction of a trial becomes unavoidable, and where, in case of casualties so likely to occur, it would be impossible to assemble an entirely new court. It must, at the same time, be particularly observed, that the not adding new members would be of no benefit to the prisoner; for he could not be acquitted by a Court consisting of less than the legal number of members*, and he would, therefore, be liable to be tried *de novo* by a new court, and might, in consequence, be subjected to a prolonged state of arrest or confinement.

IDENTIFICATION OF THE PRISONER. — Captain Hough, in p. 750., observes, "that proof must be adduced that the prisoner possesses the character

* If, by any circumstance, a Court Martial be reduced below the legal number of members, the functions of the remaining members immediately cease, as they no longer form a court legally constituted, and they, consequently, cannot perform as such any act whatever. In such a case, therefore, they must break up and report the circumstance to the authority by whom the Court was convened.

which the Mutiny Act requires. At no Court Martial, at which I have been present, was ever such proof adduced or required; nor have I ever heard of such is any where the practice of the Indian Army. On this point the same argument urged by the Judge Advocate General on Lieut. Colonel Johnston's trial becomes equally applicable. "We submit to the Court (he observed), whether they are on the outset to call for evidence to prove the existence of manifest impediment, before they proceed on the warrant, which is to presume the illegality of the warrant; and, consequently, that the crown in issuing the warrant has taken upon itself what does not belong to it; or whether, no objection being taken, they will presume that manifest impediment did exist." For the prisoner is brought before a Court Martial by order of a competent authority under the character of an officer or a soldier, and this order is *prima facie* sufficient evidence of his being the person intended by the charge, and of his being subject to the jurisdiction of a Court Martial. It, therefore, remains for the prisoner himself to object to his identity, and to urge the several pleas in bar of trial which the law allows him to plead; but no rule of law obliges the prosecutor, or requires the Court, to enter into any enquiry respecting pleas not pleaded.

The practice of the Home-Guards, in which Captain Hough's opinion is founded, appears to originate in the form adopted in courts of law of identifying the person of the prisoner by desiring him to hold up his hand on being brought to the bar. But, "this ceremony is not essential; the object is answered if the prisoner admits that he is the same person." * If, however, the prisoner should refuse to do either, I do not observe in any law book any rule laid down for the further proceeding of the Court †; and even if the prisoner admits his identity at this stage of the proceedings, he may afterwards deny it, by pleading to the jurisdiction or in abatement. As, therefore, the law does not positively require that, on the prisoner being brought to the bar, proof of the identity of the prisoner's person shall be adduced, and as such proof could only tend to embarrass a subsequent stage of the proceedings, there can be no necessity for Courts Martial adopting a mere form which might involve them in inextricable difficulties.

If, however, the prisoner is charged with improper conduct in a particular character, as in that of a commander-in-chief of a body of forces,

* Starkie on Criminal Pleading, p. 289.

† Hawkins, Blackstone, and Starkie, pass it over in silence.

it then becomes requisite that the prosecutor, should either prove that the prisoner was actually vested with this character at the time alleged, or that the prisoner should admit it. But this forms part of the evidence in support of the prosecution, and is perfectly distinct from the legal form of identifying the person of the prisoner, on his being brought to the bar.

COMMUNICATION OF PARTIES WITH WITNESSES.
— Captain Hough observes, p. 798., that “a witness may see questions before the trial, but must not answer them.” But this opinion is not supported by the authorities quoted in p. 526.; for the Marquis of Hastings merely censures the instructing witnesses severally in their lesson beforehand, the impropriety of which must be self-evident; and in the extract from the proceedings of the Court Martial, it is clear that the objection arose from the questions having been *concerted* between the prisoner and the witness. Captain Hough, also, in p. 602., adduces the opinion of the Marquis of Hastings, and of Tytler, to show that a prosecutor ought to instruct himself in all the circumstances of the case, and by what evidence the whole particulars are to be proved. Nor can a prisoner be denied the same liberty in preparing his defence. Such communications, at the same time, are perfectly

legal.*; and it, therefore, merely remains for the parties to ascertain by the cross-examination of a witness whether or not he is at all biassed or interested in the evidence which he gives.

As, in English courts of law, either party may object to the competency of a witness, or try his credibility by the most unrestricted cross-examination, the preliminary question, mentioned by Tytler, and quoted by Captain Hough, in p. 797., is never in them put to a witness. This form is peculiar to the Scottish courts of law. †

Art. 30. sect. 16. FINDING AND SENTENCE. — Captain Hough has fallen into a very material error in stating, in p. 521., that a charge may be brought within the intent and meaning of

* The mere communication of a party with a witness, either verbally or by writing, is not included amongst the causes which render a witness legally incompetent, and, therefore, the party objecting must prove that the communication was of such a nature as to render the witness incompetent.

† "When a witness was liable to any objection on account of interest, &c., the old rule was either to examine him upon the *voire dire*, as to his situation, or to call other witnesses to prove the fact which rendered him incompetent." — "But the modern practice is to swear the witness in chief in the first instance; and if at any time during the trial it be discovered that he is in a situation which renders him incompetent, it is then time to take the objection." Peake, on Ev. p. 195.

With respect to the latitude of cross-examination, see *ante*, p. 67.

an Article of War, though the allegations are not expressed in the exact words of such article; and on this principle he has arranged, under the 30th article, 16th section, various offences to which this article cannot possibly apply. For it is perfectly clear, that

Conduct unbecoming the character of an officer and a gentleman;

Scandalous and disgraceful conduct highly unbecoming, &c.;

Highly scandalous and disgraceful conduct unbecoming, &c.;

Conduct highly unbecoming and degrading to, &c.;

Or, particularly, behaving in a disorderly manner, unbecoming the character of an officer, and similar charges, in which the word *gentleman* is omitted,

is not the same offence as *behaving in a scandalous, infamous manner, such as is unbecoming the character of an officer and a gentleman*. But it is an incontrovertible principle of law that "in an indictment nothing material shall be taken by intendment or implication *;" and, consequently, a charge drawn up in any of the above or similar formulas cannot be brought under this Article of

* 4 Hawkins, 38.

War, but must be referred, however aggravated the offence may be, to the 2d article of the 24th section.

Captain Hough, however, in p. 497., argues that, as in several cases Courts Martial have applied the penalty specified in this article to convictions on charges not drawn up in its precise words, it must be inferred, that these courts were of opinion that such charges came under this particular article.* But on what grounds can this inference be defended? For nothing further can be known respecting the opinion of these courts than is contained in the sentences, and not one of these support in any manner the conclusion drawn by Captain Hough. It is, at the same time, incontrovertible, that Courts Martial are averse to being restricted in their judicial capacity, and that they will never, therefore, admit that a charge rests on a specific Article of War, unless it is framed in the precise words of that article. In cases, also, where the punishment is left to the discretion of the Court, as it is in the 2d article, 24th section, nothing can be learned from the punishment awarded, because its greater, or less severity must depend entirely on the circumstances of each particular case. But the Sovereign and

* At least as far as I understand the intention of Captain Hough's remarks.

commanders-in-chief have endeavoured to impress on members of Courts Martial, that, whenever an officer is found guilty of *conduct unbecoming an officer and a gentleman*, he is no longer a proper person to remain in the army; and that, consequently, the only punishment which they ought, in such a case to award, is such an one as deprives the prisoner of his commission. But that, should they be of opinion that the facts alleged in a charge submitted to their investigation, in which these words are used, do not amount to this offence, but that the prisoner is not altogether innocent, it is equally their duty to acquit him of it, and to find him guilty of any of the minor degrees of unbecoming conduct, which is certainly included under it. It is in this sense only that His late Majesty's sentiments, quoted by Captain Hough, in p. 521., can be understood, and not as pointing to an Article of War, which could not possibly apply to the charge remarked upon.

The error, therefore, which Courts Martial are apt to commit, is not, as it might be supposed, from Captain Hough's work, the unduly extending the construction of the Articles of War, so as to embrace within particular Articles offences to which they do not apply; but the not admitting, in cases where a specific penalty is annexed, that a charge is so framed as to bring it within the Article of

War intended by the prosecutor. The same principle, also, sometimes induces Courts Martial, when the conformity of the charge with the article cannot be disputed, to put a construction on the particular article totally at variance with its obvious intent and meaning. Hence with respect to this Article an argument is drawn from the words of the last clause; "*Provided, however, that in every charge preferred against an officer for such scandalous or unbecoming behaviour,*" &c. For it is contended that the adversative conjunction here introduced fully justifies the separation of this offence into two distinct degrees. But it is contrary to every received rule of interpretation to consider the affirmative part of this article as affected by subsequent words obviously not introduced with the intent of explaining or modifying the preceding ones, but for the express purpose of making a new and distinct provision.* The words, also, *such as is*, under the construction controverted, would thus become of no force or effect. But, as these words are not repugnant to what precedes or follows them, and are, on the

* A simple perusal of this article would, I think, convince any person, who had not formed a previous opinion, that the last clause was never intended to explain or modify the first; but introduced solely for the purpose of requiring a clear specification of the facts, on which every charge of so dishonoring and ruinous a nature rested.

contrary, essential to the proper definition of the offence here described, they cannot be rejected; and it must, consequently, be concluded that, to find the prisoner guilty of this offence, it must be proved that *the behaviour unbecoming the character of an officer and a gentleman* was also SUCH AS IS *scandalous and infamous*. It is, on this account, that charges for conduct *unbecoming the character of an officer and a gentleman* are seldom framed in the precise words of this Article, both in consideration to the officer accused, and, also, in order that the difficulty of proof may be obviated, and that the Court may be at perfect liberty to modify their finding according to the evidence adduced, and to award punishment accordingly. But, whenever the precise words are used, correctness of procedure and lenity to the prisoner, will be best consulted by convicting or acquitting him of the whole charge.

Captain Hough's classification of offences. As these remarks will, perhaps, evince that Captain Hough's opinion in this instance is in direct

opposition to both military and criminal law, it will not be necessary to enter into any examination of the cases, which he has so erroneously arranged under Articles of War that, most undoubtedly, never were in the contemplation of the Courts Martial which awarded the different sentences.

For Captain Hough's classification of offences proceeds entirely on the *illegal* principle that, "the charge was brought within the *intent* and *meaning* of the Article *;" and that, consequently, it is a matter of perfect indifference whether an officer is accused of *being drunk on duty* or of *being drunk on duty under arms*; or a soldier of *insubordinate and mutinous conduct*, or of *mutiny*. Because, in whatever manner the charge may be expressed, it is still competent for a Court Martial to supply by *intendment* or *implication* the material words necessary for bringing the offence charged within that particular Article of War, to which it may have some degree of similarity. But it must be obvious that such a mode of construction would completely defeat the object and intention of accusing a prisoner of a less offence, or degree of offence, than the alleged act might have warranted; and that the prisoner would, in such a case, be actually convicted of an offence, on which he had neither been arraigned nor tried. A reference, therefore, to Captain Hough's work can only mislead, for the running title to its different divisions points out a specific Article of War, which, in numerous instances, will be found on examination to be perfectly inapplicable to the case quoted. †

* Case Book, p. 521.

† For instance, the material words in the 3d article, 2d section, are, "*shall begin, excite, cause, or join in any mutiny or*

REVISION. In p. 622, Captain Hough quotes these words, "Had it been practicable, the Commander of the Forces would have ordered the proceedings to be revised," and then observes, "the object of which would have been, no doubt, to have taken evidence, which might have been to the prisoner's advantage, as the whole of the charges might not have been substantiated, and consequently his punishment might have been less

sedition, on any pretence whatsoever." But not one of these words are used in cases 9. 11. 13, 14. 16, 17, 18, 19, 20. 22, 23, 24, 25., being one half of the cases quoted by Captain Hough. And of the 9th article, 14th section, the material words are, *shall be found drunk on his guard, party, or other duty, under arms.* But this last material allegation, is not contained in cases 9, 10, 11, 12, 13, 14., quoted under this Article by Captain Hough.

In quoting the 1st article, 7th section, Captain Hough has inadvertently put a full stop, which is not in the Articles of War, after the word *arrest*; a material error, because, though this Article is not expressed with sufficient precision, still it is evident that the penalty prescribed in it is merely asking pardon of the party offended. Consequently none of the cases here given by Captain Hough apply to this Article; and particularly I can affirm from personal knowledge that it was never in the contemplation of the Court Martial which awarded the sentence quoted in case 6th. This last remark applies, also, to case 21., quoted under the 30th article, 16th section.

and could not have been greater.* The G. O. C., 1st June 1816, only directs that "*fresh* witnesses are not to be examined on revision." But in this general order, on the contrary, the Marquis of Hastings positively directs, that, "whenever the proceedings of Courts Martial are ordered to be revised, their revision is to be confined to the matter already recorded on their proceedings."† In the case, also, of Colonel Cawthorne, the Court was not ordered to revise the sentence which they had passed on certain articles of the charge submitted to their investigation, but to proceed and in-

* This case is a striking instance of the want of proper consideration with which the cases in this work have been selected, and of Captain Hough's ignorance of the subject which he pretends to discuss. For as, in this instance, no evidence on either side had been adduced; and the conviction rested solely on the confession of the prisoner, it must be self-evident that the re-assembling the Court Martial considered necessary could not have been for the purpose of revising the sentence, but of commencing the trial *de novo*. This appears clearly from the remark of the Commander of the Forces that the prisoner might have forgotten what had passed in a state of intoxication, and that, therefore, his subsequent confession of acts alleged to have then occurred, ought not to have been held sufficient for his conviction. But this commencement of the trial *de novo* would have been illegal; for the prisoner had been legally tried and convicted, and consequently could not be tried a second time for the same offence either by the same or by any other court.

† Case Book, p. 398.

investigate the remaining articles on which they had previously refrained from giving any opinion. This case, at the same time, appears to be *sur generis*; and no argument can be founded on it; because the Court had on the first Articles adjudged Colonel Cawthorne to be cashiered and declared unworthy to serve His Majesty in any military capacity whatever; so that no evidence affecting the former decision could have transpired, during the investigation of the remaining articles, which could possibly have operated to the detriment of the prisoner. As usual, therefore, Captain Hough's opinion is unsupported by the very authorities which he himself quotes, and the observations on this point in the preceding pages will, in consequence, be probably found the most correct.

In making these remarks * I am solely actuated by a wish to prevent the reception of opinions,

* These remarks have been confined to points of material importance, and I have not thought it necessary to notice the other errors which occur in this work. For instance, in p. 752, *Captain Hough* adds to the pleas in bar of trial described by *Blackstone* an alibi, and then immediately quotes these words from a speech of Mr. Gurney: "An alibi is the best of all defences, &c." Whence Captain Hough derived this amendment of *Blackstone* I know not; but most certainly an alibi is not a plea in bar of trial, though, if it can be substantiated, it is the best of all defences.

which appear to me to have been advanced without due consideration or competent knowledge of the subject; and which so obviously tend to increase the uncertainty of military law and to embarrass the practice of Courts Martial with unnecessary doubts and distinctions. That Captain Hough ever contemplated that his work could be productive of such consequences cannot be supposed; for he has, with the most unexampled candour, produced authorities that in most instances directly contradict the opinions which he maintains. But it might be reasonably expected that a writer on military law should, in the first place, fully instruct himself in what that law is, whether derived from custom or written provisions; and that, afterwards, he should carefully consider whether the rules of interpretation and of proceeding observed in military courts differ in any point from the positive and undisputed principles of the law of the land. For if they do not, and Captain Hough has not

On what principle, also, Mr. Samuel and "*Vattel on the Law of Nations,*" are quoted for the purpose of explaining what a *safeguard* is, I cannot imagine. I should have thought that Captain Hough himself, or any other officer, would have been much better authority; for it is an established maxim of law that technical terms shall be understood in that sense in which they are used in the particular art or profession to which they belong.

even attempted to shew that there is any such variance, it is not only unnecessary, but pernicious, to disturb the received practice by the collection or expression, of contradictory opinions unsanctioned by any authority, and by endeavours to pervert the long established and only legal mode of distinguishing the kinds and degrees of offences which are described in the Mutiny Act and Articles of War.

APPENDIX.

No. 1.

THE following General Orders published to the army of Bombay, as they afford much information in a condensed form on the subject of the preceding remarks, will perhaps be considered an acceptable accompaniment to them.

GENERAL ORDERS.

Head Quarters, Bombay, Monday, 9th June, 1823.

BY THE COMMANDER-IN-CHIEF.

1st. Previously to their appearing in the corrected general code of regulations for the guidance of the army and its departments under this presidency, now preparing for the press, by order of the honourable the Governor in Council, the Commander-in-Chief directs the adoption of the following introductory instructions relating to the very important duties of Courts Martial.

2d. In these instructions a small portion of fresh matter will be found, but for the greater part they consist of what has hitherto been a good deal observed in the conduct of our Military Courts, although it has wanted the promulgated sanction of the proper authorities in this country to ensure its uniform practice.

COURTS MARTIAL.

1. The duties attached to officers employed on Courts Martial are of the most grave and important nature, and in order to discharge them with justice and propriety, it is incumbent on all officers to apply themselves diligently to the acquirement of a competent knowledge of military law, and to make themselves perfectly acquainted with all orders and regulations, and with the practice of Military Courts. With this view the commanding officers of regiments are to require all officers on their entrance into the army, and before they are nominated to be members of Courts Martial, to attend the proceedings of such courts, until the commanding officers may deem them competent for the performance of so important a duty.

2. When any European or native officer is put under arrest in order to be brought to trial before a General Court Martial, immediate information thereof, accompanied with the charges preferred against him officially signed, must be sent to the Adjutant-General.

3. To prevent the inconvenience arising from the extraordinary assembly of General Courts Martial, whether European or native, it is directed that all commanding officers, previously to transmitting charges to Head Quarters, shall carefully investigate the circumstances on which the charges are founded.

4. Whenever an officer is put under arrest, he is strictly and invariably to consider himself confined to his quarters, tent, or other place of residence, until regular application be made to the commanding officer for the liberty or range of the garrison, cantonment, or camp, by whom it will in most instances be granted, or, when necessary, referred to the Commander-in-chief.

5. In drawing up charges, the utmost precision must be observed in specifying the fact to which criminality is attached, and in describing the time and place when and where such fact took place.

6. Facts of a distinct nature are not to be included in one and the same charge or instance of a charge, but each different fact is to be specified in a distinct instance or charge.

7. All extraneous matter is to be carefully avoided, and nothing is to be alleged but that which is culpable, and which the complainant is prepared to substantiate before a Court Martial.

8. It is not necessary that it shall be specified in a charge, that the offence alleged has been committed in breach of any particular Article of War. But if

the complainant wishes to subject the officer accused to the precise penalty prescribed in any particular Article, the criminative part of the charge must then be drawn up in the same words that are employed in such Article.

9. The Commander-in-chief directs, that whenever a report is made to a commanding officer of a garrison, station, or division, (in any place where there is no form of civil judicature in force,) that a murder has been committed, or that a dead body supposed to have been murdered has been found, he shall immediately direct the body to be examined by a medical gentleman, if one is at hand, or otherwise by the most competent person to give an opinion on such a subject, and a Court of Enquiry to be assembled in order to investigate the circumstances of the murder. It shall then be the duty of the Court of Enquiry to ascertain, with as much exactness as possible, the precise nature of the wounds or blows, and of the instrument or means by which death was occasioned, the person or persons who actually inflicted the mortal blow, and if there were any aiders or abettors in the commission of the murder, and such other particulars as may afford the means of drawing up a charge, (should this be found requisite) against the individual or individuals accused of the murder, in that special manner, and with that precision which is required by law.

10. It is not to be supposed, that a charge is of course to be laid before a Court Martial in the form in which it has been drawn up by the complainant,

as it is competent for the officer who may order the Court to be assembled, to make such alteration in it, either in its substance or in other respects, as he may deem requisite.

11. But after a charge has been approved of by a proper authority and ordered to be investigated, it is not competent for the Judge-Advocate or any other person, to make any alterations in it without the consent of such authority being previously obtained.

12. It is highly improper that charges should be kept in reserve against an officer or soldier until they have accumulated, and that they should then be brought before a General Court Martial collectively; whereas every charge should be preferred at the time when the fact or facts on which it turns was recent, or, if knowingly passed over, it ought not either in candour or in justice to be in future brought into question.

13. It is to be particularly observed, that an officer has no right to demand a Court Martial either on himself or on others: the granting of a trial resting solely in the discretion of the Commander-in-chief.

14. Nor has an officer who may have been placed in arrest any right to demand a Court Martial on himself, or to persist in considering himself under the restraint of such arrest, after he shall have been released by proper authority, or to refuse to return to the exercise of his duty.

15. After a prisoner has been arraigned on specific charges, it is perfectly irregular for a Court Martial

to admit of any additional charges being preferred against him, even although he may not have come on his defence. The trial on the charges first preferred must be regularly concluded, and then, if necessary, the prisoner may be tried on any further accusation that is brought against him.

16. No officer or soldier being acquitted or convicted of any offence, is liable to be tried a second time for the same offence. But it must be observed that this provision applies solely to trial for the same identical act and crime, and to such persons as have in the first instance been legally tried. For if any illegality takes place in a trial the prisoner must be discharged, and he remains exactly in the same situation as before the commencement of these illegal proceedings. The same charge may, therefore, be again preferred against the prisoner, and in this case, he cannot plead former acquittal or conviction in bar of his impending trial.

17. A prisoner cannot plead in bar of trial that he has not been furnished with a copy of the charges, or that the copy furnished him differs from those on which he has been arraigned. Because, though it is customary to furnish him with a correct copy, it is not legally necessary.

18. The least number of members of which a General Court Martial in His Majesty's service can legally consist for the trial of an officer, or for being competent to adjudge a soldier to loss of life or limb, or transportation, is thirteen and to award a lesser

punishment, and a soldier, &c. In the Company's service the least number, whether the General Court Martial is European or native, is nine. But in order to prevent this legal number from being diminished by sickness or other accidents, a General Court Martial ought always, if possible, to consist of fifteen members, or more.

19. All members at a General Court Martial of whatever number it may consist, must be duly sworn in, and vote, and give their opinions.

20. If the President of a General Court Martial, consisting of more members than the legal number, be from any cause unable to attend the Court, a warrant may be issued appointing the next senior member President, and the trial proceed without interruption.

21. Whenever a member is prevented from attending a Court Martial, the cause must be duly certified, and that member cannot again resume his seat.

22. No act can be legally performed by a part only of a Court Martial.

23. The day and place of meeting of a General Court Martial having been previously published in general or division orders, the officers appointed as members, the parties, &c. witnesses must attend accordingly. The Judge-Advocate then calls over the names of the members, and they arrange themselves to the right or left of the President according to their seniority in the army.

24. The prisoner is then called into court, and although till this period he may have been in close confinement or even in irons, he must appear there unfettered and without bonds, unless when there is danger of escape, or rescue.

25. Previously to the members of a General Court Martial being sworn in, both the prosecutor and prisoner have the right of challenging them. But they cannot object to the President, as he is appointed by warrant, nor to the Judge-Advocate, as he acts on behalf of the crown.

26. Peremptory challenges are not allowed at a General Court Martial; and the party must therefore assign his cause of challenge, which is to be regularly entered on the proceedings. The member objected to then withdraws, and the Court being closed, deliberate and decide on the validity of the challenge.

27. Sufficient causes of challenge are, — the expression of an opinion relative to the subject to be investigated; the having been member of a Court of Enquiry which gave an opinion; the having been member of a General Court Martial in which the circumstances to be investigated had been discussed, either principally, collaterally, or incidentally; prejudice and malice.

28. On the arraignment of a prisoner, he must plead simply either guilty or not guilty; for at this stage of the trial he cannot enter into any explanation or exculpation of his conduct, but must confine himself to the mere confession of his guilt, or to the

simple and unqualified denial of the offence laid to his charge.

29. But whatever may be the prisoner's conduct or reply on arraignment, whether he pleads guilty, or stands mute, and it be determined by the Court to be from obstinacy or malice, the prosecutor must adduce his evidence and support the prosecution in the same manner as if the prisoner had pleaded not guilty.

30. As the King is the prosecutor of all military offences, it is the duty of the Judge-Advocate to prosecute in His Majesty's name all persons who may be brought before a General Court Martial. But it is at the same time the established practice of the army, that the person, if an officer, who either is from his situation the best acquainted with the circumstances to be investigated, or who has individually suffered an aggression or injury from the prisoner to be tried, shall sustain in court jointly with the Judge-Advocate, the character of prosecutor, and as such shall conduct of himself the whole of the prosecution.

31. But if the person bringing forward an accusation against any person in the army is not himself an officer either in the naval or military service, he cannot appear in court as the prosecutor, but merely as an informant, and in that case the Judge-Advocate conducts the prosecution.

32. The prosecutor and prisoner, on requesting it, are to be allowed the assistance either of a friend or of a professional gentleman. But no person is on any account to be permitted to address the Court, or to

interfere in any manner with its proceedings except the parties themselves.

33. In all cases in which more prisoners than one are arraigned upon different charges, and tried by the same Court Martial, the members are liable to be challenged, and the Court is to be resworn at the commencement of each trial, and the proceedings are to be made up separately and signed, as if each prisoner had been tried by a distinct Court Martial.

34. When officers, or non-commissioned officers, confine any soldiers, or sepoy, they are on no pretence to neglect attending the Court Martial to prosecute, and to have all the evidences ready to prove the charges; but should it so happen that the prosecutor or evidences do not attend, the Court Martial is never for that reason to acquit any prisoner, but to remit him back to confinement, when the cause of such neglect in the prosecutor and evidences will be particularly enquired into.

35. All preliminary forms having been duly gone through, the regular course of a trial is as follows: —

36. The prosecutor, if he thinks any opening of his case necessary, first addresses the Court, either verbally or by reading a written statement; and this address ought to be delivered previously to his being sworn, in case of his being also examined as a witness.

37. This opening address ought to be confined solely to such remarks as tend to elucidate either the origin or the nature of the charges, and to explain

the manner in which they are to be substantiated; and it ought never to be made the vehicle of invective against the prisoner, or the means of exciting a prejudice against him in the minds of the Court.

38. The prosecutor then calls his witnesses, and produces his written evidence; and may, if he desires it, be also examined as a witness in support of the charges which he has himself preferred.

39. In adducing this evidence the prosecutor must not be allowed to aggravate the guilt of the prisoner by examining into facts unconnected with the specific offence alleged in the charge; but he must confine his proof to such circumstances only, as clearly tend to convict the prisoner of the particular accusation preferred against him; and no matter, not put in issue by the charge, can be received by the Court, which would implicate the prisoner in a new or distinct offence, or in a greater degree or extent of guilt than appears in the charge on which he has been arraigned.

40. Nor can the prosecutor adduce any evidence with respect to the prisoner's character, except so far as it is put in issue by the charge.

41. The prosecutor must during the prosecution, and before the prisoner comes on his defence, produce all the evidence he has to support the charge; and after the prosecution has been closed, he shall not be permitted to adduce any further evidence in proof of the specific facts alleged in the charge.

42. The prosecution being closed, the prisoner then enters on his defence, and may either address

the Court first, and then adduce his evidence, or defer his address until the whole of his exculpatory proof has been laid before the Court.

43. In conducting his defence, a prisoner is allowed every facility of proving his innocence, or of extenuating the culpability of which he is accused. He is, therefore, at liberty to bring forward and establish by evidence every circumstance which, in his opinion, tends to palliate his conduct, or to refute entirely the charge preferred against him. He may even vindicate himself by throwing blame or criminality on others, who are no parties to the trial, as no justification can be more complete than for a prisoner to prove that he was compelled to commit the alleged offence, or that the act imputed to him was in reality committed by others.

44. But a Court Martial ought never to allow a prisoner to implicate the characters of persons not present to defend themselves, unless he previously satisfies them that such proof is essential to his justification. Whenever, therefore, it is evident that the prisoner, in impeaching the characters of others, is proceeding on vague and ill-founded suppositions, or that he is clearly actuated by resentment, and not by a desire to exculpate his own conduct, the Court ought immediately to reject all such evidence as neither tending to extenuation nor exculpation.

45. In drawing up their written addresses to the Court, prisoners ought always to recollect that unwarranted recrimination on the prosecutor, illiberal

reflections on his witnesses, and most particularly the impeachment of the character of any person not a party to the trial, when unnecessary and irrelevant, will ever meet with the most marked disapprobation of the Commander-in-chief, and will always prevent him from extending lenity to an officer who has recourse to such a mode of defence.

46. In all cases where a prisoner produces evidence on his defence, a prosecutor has a right to reply ; but he cannot adduce any fresh evidence unless new matter has been introduced on the defence, in which case he is allowed to controvert this new matter by evidence.

47. When the prisoner has not adduced evidence on his defence, it remains in the discretion of the Court to determine, whether the prosecutor shall be permitted to reply or not. In deciding on which point, no better rule can be prescribed for its guidance, than that a reply should be permitted whenever the defence contains any assertions or any matter on which the prosecutor has not previously had an opportunity of addressing the Court ; for it is equally impossible for the Court, as for the approving officer, to do impartial justice, unless the whole of the case of each party is fairly brought before them.

48. A rejoinder is not a matter of right, and should never be permitted by a Court Martial, except when evidence has been adduced on the reply.

49. All persons, of whatever religion or country, that have the use of their reason, are to be received

and examined as witnesses, except such as are infamous, or are interested in the cause.

50. Infamy arises from a person having been convicted of certain crimes and misdemeanors, and judgment passed on him in consequence. But to render him incompetent as a witness, no proof of such conviction can be received except a copy of the record itself.

51. Interest in the cause arises from a person deriving a certain and immediate gain, or incurring a certain and immediate loss, from the testimony which he might give. A contingent, or barely possible gain or loss, does not render him incompetent.

52. A person, therefore, is rejected on account of interest, if he is either a party in a similar cause, or is liable to prosecution on the same grounds or for the same offence.*

53. But an accomplice, or *particeps criminis*, is a competent witness against the persons who were his associates in the commission of an offence.

54. Parties to a trial being allowed to support their witnesses, money received *bonâ fide* for that purpose does not render the witness incompetent.

55. It is not only allowable for either party to ascertain by previous enquiry the evidence which persons may have it in their power to give in his favour, but it is also his duty, in order to prevent the time

* This correct, see the preceding remarks, p. 59.

of the Court from being wasted by an examination of witnesses unacquainted with the circumstances of the case.

56. Such communications, therefore, do not in themselves affect the credibility or competency of a witness. But the opposite party and the Court are at liberty to examine the witness respecting the nature of any communication on the subject of the charges under investigation, which he may have had with the party producing him; and should it, at any stage of the trial, appear from such examination, that he has an interest in the evidence which he is giving, the Court shall immediately reject his testimony: should, also, no circumstances appear to render the witness incompetent, still if the party producing him has used any means to create an improper bias in his mind, or to suggest in any manner the evidence to be given, the testimony of such a witness will be entitled to little or no credit.

57. The law further declares, that husbands and wives cannot be witnesses for or against each other, in any action wherein one of the married persons is a party, but every other relation of kindred, as well as servants in the cause of their masters, are competent witnesses.

58. Counsels and attornies, also, cannot be called upon to give evidence, which would disclose the secrets which their clients may have confided to them for the purpose of enabling them to conduct a cause.

59. The admissibility of children as witnesses, is

not regulated by their age, but, by their apparent sense and understanding. Children, therefore, of any age may be examined on oath, if capable of distinguishing between good and evil, but they cannot in any case be examined without oath.

60. If a child is unfit to be sworn, it follows as a necessary consequence that any account which it may have given to others is not to be admitted.

61. The exception to a witness ought in strictness to be made before he is sworn in. But it is also competent for a Court Martial, at whatever stage of a trial the incompetency of a witness appears, to arrest his evidence, and to discharge his testimony from their minds.

62. The prosecutor and prisoner are both allowed to take exceptions to the competency of a witness, which are to be stated in open court, and recorded on the proceedings of the trial, after which the Court decide on their validity.

63. When no exception is made to a witness, he is to be duly sworn, and is then first examined in chief by the party who produces him; the opposite party next cross-examines him, and in case of new matter being introduced on the cross-examination, the party calling him re-examines into that matter; and then the Court put such questions to the witness as they may think necessary.

64. It is essential to the regularity of the proceedings of a Court Martial, that this mode of examining

witnesses should be strictly adhered to. For whenever the parties or the Court put questions backwards and forwards, first one and then the other, it confuses the witness, perplexes the case, and most materially incapacitates the party producing the witness from deriving that benefit from his testimony which he might otherwise have done.

65. When witnesses are called to character, they must be duly sworn, and cannot be cross-examined, nor can any examination take place into particular facts. But the witness may be called upon to assign his reasons for the character which he has given in evidence.

66. When the trial is finished, the Court is closed, and proceeds to deliberate on its verdict and sentence.

67. Members of Courts Martial ought then to bear in mind that they have two distinct duties to perform, the one, that of jurors, and the other, that of judges.

68. In the first of these capacities, they are bound to find a verdict according to the evidence which has been produced before them. But this verdict may either be general, declaring the prisoner guilty or not guilty of the whole charge preferred against him, or it may be particular, finding that such and such allegations have been proved, and acquitting the prisoner of the others. The Court may also in cases wherein the offence admits of gradations, acquit of the degree charged, and find the prisoner guilty in a lesser degree. But they must in all cases exhaust the charge, and

declare their opinion on each particular allegation which may be contained in it.

69. In their other capacity, if the verdict be guilty, the members of a Court Martial, the *minority*, even if they have acquitted the prisoner, as well as the *majority*, are bound by their oath to duly administer justice by awarding such a punishment as is proportionate to the degree of guilt of which the prisoner has been convicted. No mitigating circumstances whatever ought then to influence their judgment, and their attention ought solely to be directed to the nature of the offence, to the custom of war in the like cases, and to the effect which their sentence may produce towards maintaining the discipline of the army.

70. If mitigating circumstances have appeared during the trial which could not be taken into consideration in determining the degree of guilt found by their verdict, the Court can only avail themselves of such circumstances, as adequate grounds for recommending the prisoner to mercy.

71. No recommendation to mercy is to be written in the body of the sentence, but it is to be inserted on the same page below the signatures of the President and Judge-Advocate.

72. In cases where a prisoner rests his defence on the plea of intoxication or insanity, it is to be remarked that the law considers voluntary contracted madness, by intoxication, to be an aggravation and not an excuse for any criminal misbehaviour. Such a plea ought therefore to have no influence on the sen-

tence awarded by the Court, though it might in certain cases induce them to recommend the prisoner to mercy.

73. With regard to insanity, the law holds that if there be only a partial degree of insanity mixed with a partial degree of reason, not a full and complete use of reason, but a competent use of it sufficient to have restrained those passions which produced the crime, if there be thought and design, a faculty to distinguish the nature of actions, to discern the difference between moral good and evil, then upon the fact of the offence proved the judgment of the law must take place. It is, also, to be remarked that on all acquittals on account of insanity, the Court must find specially whether the prisoner was insane when he committed the crime, and must declare in their finding that he was acquitted on this account.

74. In all cases wherein the offence of which a prisoner is convicted comes under any particular Article of War, the Court can award no other punishment than the one prescribed in such article.

75. When, however, the punishment is left to the discretion of the Court, it is to be understood that such discretion must be regulated by the custom of war in the like cases; and Courts Martial ought therefore to award no unusual punishment except when the circumstances of a particular case may imperiously require it.

76. The usual penalties to which an officer may be subjected are cashiering, dismissal, and discharge. In

His Majesty's service reduction of rank may also be awarded, but not suspension from rank and pay. In the Honourable Company's Service, on the other hand, suspension may be awarded, but not reduction of rank.

77. It is to be observed, that when an officer is brought to trial for behaving in a scandalous, infamous manner, such as is unbecoming the character of an officer and a gentleman, the Court must find him either guilty or not guilty of the charge. For these words constitute but one single offence; and it is, therefore, not competent for the Court to divide them, and to declare the prisoner guilty to a certain extent only.

78. The usual punishment awarded against warrant or non-commissioned officers is reduction, but further penalties may be added according to the nature of the case.

79. The sentencing a warrant or non-commissioned officer to be reprimanded, is both unusual and inefficacious as a punishment; and, therefore, such a sentence ought never to be awarded by a Court Martial.

80. The usual punishments of a soldier, either in His Majesty's or the Honourable Company's Service, are flogging, and imprisonment, solitary or otherwise.

81. In His Majesty's service transportation can be awarded for the crime of desertion only, and in the Honourable Company's service no person can be subjected to that punishment.

82. It is to be observed that two punishments of a distinct nature and degree from each other cannot be inflicted for the same offence, except in cases wherein such power has been conveyed to Courts Martial by some express provision of the Mutiny Act.

83. It is also inexpedient that Courts Martial should award a punishment so excessive in amount, as to render it impossible for the Commander-in-Chief to confirm it with any regard to the good of the public service.

84. In all cases when an officer or soldier is tried under the 4th article, 24th section, of His Majesty's Articles of War, or the 5th article, 15th section, of the Honourable Company's Articles of War, Courts Martial are bound to award such punishments only as are known to the laws of England, and to apply to each particular offence the same punishment, both in kind and degree, that is applied by the common or statute law of England.

85. In drawing up the findings and sentences of Courts Martial the utmost precision is to be observed in specifying how far the prisoner is guilty or not guilty of each charge, or instance of charge, and in specifying the exact nature and degree of punishment which the Court has awarded.

86. Whenever the proceedings of a Court Martial are ordered to be revised, it is highly irregular and objectionable for the Court to call and examine fresh witnesses. The revision is to be confined entirely to

a reconsideration of the matter already recorded on the proceedings.

87. It is to be particularly observed, that however excusable an adherence from conscientious motives to a finding and sentence once pronounced may be, yet where error in judgment arising from a misconception of the law, or of the custom of war in the like cases, brought to the notice of a Court Martial, supported by respectable authority, their perseverance in error is a dereliction of duty, and a baneful example.

No. II.

Extract of a Letter from R. Spankie, Esq., Advocate-General, Calcutta, to the most Noble the Marquis of Hastings, dated November 3. 1822.

As to the right to reply generally, and in all cases, it seems to be claimed by the Judge-Advocate, as an officer and prosecutor like the Attorney-General, and not on general grounds; for, the opinion of Mr. Woodehouse is, upon any other principle, directly against him. The reason of the thing would extend the privilege to the Judge-Advocate, at least in all cases where the offence is strictly of a public nature, like a state-prosecution contra-distinguished from that which is set on foot by the private prosecutor for a personal wrong, though the proceeding is in the name of the King. The Article of War, on which the claim is founded, is, as has been observed by Tytler, p. 358., very inaccurately expressed. "The Judge-Advocate-General, or some person deputed by him, shall prosecute in our name." The Judge-Advocate-General, I apprehend, is a different officer from these to whom the appellation is sometimes applied; but admitting, what will not be denied, that a Judge-Advocate, who is neither the Judge-Advocate-General, nor a person deputed by him, may be legally appointed and authorised to prosecute in the King's name, I do not think that, independently of usage,

and of the principles which are applicable to prosecutions in the name of the King generally, it would follow, that the Judge-Advocate would be entitled to a privilege *exclusively belonging* in courts of law to the Attorney-General. As far as I can discover, however, it is the practice of Courts Martial for the Judge-Advocate to reply, taking a view of the whole case, and answering the observations of the prisoner.

The general understanding at the bar, and a very uniform usage as far as I have observed, restricts the right of reply to public prosecutions by the Attorney-General, and cases I apprehend, where, as on the circuit, the Attorney-General is represented by some other counsel for the crown. The latest book of practice in criminal proceedings (Chitty) states the right to be confined to the Attorney and Solicitor. Upon looking more diligently into the books, however, I find that the point is by no means so clearly established as I had stated, or as might be inferred from my letter to Colonel Macra. In the case of *K. v. Horne*, Lord MANSFIELD expressly denied that there was any *such rule* as that the counsel for the prosecution, even a private prosecution, should not reply, when no witnesses were called, "if new matter is urged which calls for a reply; new questions of law, new observations, or any matter that makes a reply necessary." These are the words of Lord MANSFIELD.*

* [Lord Mansfield further said on this occasion, "I am most clear that the Attorney-General has a right to reply if he thinks fit, and that I cannot deprive him of it; and there is no such rule, that in no case a private prosecutor or a

In the case of *K. v. Lord Abington*, Lord KENYON is stated in two reports of authority to have denied the right, and to have disapproved the practice; and he would not allow Mr. Esauke for the prosecutor (a private prosecutor in a case of libel) to reply. But in a late edition of one of these Reports, the reporter states, that afterwards in *K. v. Smith* (for a libel) Lord KARRON, though his own decision was cited, permitted the private prosecutor to reply, though no witnesses had been called by the defendant.

Indeed it seems to me that originally the right of reply was admitted in all cases where the prosecution was in the King's name, and that by degrees it became the practice of the courts to discourage it in ordinary cases; prosecutions of a public nature by the Attorney-General, strictly on the part of the crown, remaining, as it were, excepted cases.

I incline to think that, according to strict principles, the counsel for the King, in whose name the

private plaintiff shall not reply, if new matter is urged which calls for a reply; new questions of law, new observations, or any matter that makes a reply necessary; no authority at law has been quoted to the contrary. A party that begins has a right to reply; there is not a state trial where the Solicitor-General or Attorney-General has not replied; and I know of no law that says in any case the prosecutor may not reply." *State Trials*, vol. xx. p. 664.

[This opinion was given in answer to Horne Tooke's objections to the claim of the Attorney-General to reply, notwithstanding that no witnesses had been called on the defence.]

prosecutions must be, are entitled to reply, though I find no instance of its being absolutely and peremptorily insisted upon as a right. I have no doubt, however, that the court would (and I conceive it would be its duty to do so in cases such as Lord MANSFIELD suggested as instances) allow the prosecutor to reply; and I cannot conceive how, in a case like that in question*, the Court could refuse to permit the Judge-Advocate to reply, so far as to point out the irregularity and the impropriety of gratuitous allegations of facts, which the defendant did not attempt to establish by proof, and to explain the circumstances.

It therefore does not appear to me necessary in order to warrant the claim of the Judge-Advocate to reply in a case like this, that he should be considered to have the same privileges as the Attorney-General. I should rather consider that he had the right as prosecutor on behalf of the King, unless in cases where, as by practice in the courts of law, the right has been modified and restrained. The general right may be implied from Lord KENYON'S allowing it; for, if the prosecutors had no right *by law*, Lord MANSFIELD, in *Horne's case*, says it would be such an irregularity to allow it, that the verdict would be set aside. For their own convenience, and in most cases where no evidence is adduced, it being unnecessary, the reply has been restrained by the Court in ordinary cases;

* [The trial of Lieutenant-Colonel Robison, H. M.'s 24th regiment, on charges preferred against him, by order of the Commander-in-Chief in India.]

but I am of opinion, that in all cases where the King is prosecutor, even in form, the reply is warranted by law, though no witnesses be called, and in state-ness is matter of right. I think, too, that in a mode of proceeding, where there is no other officer to represent the crown, like the Attorney-General, the Judge-Advocate, in public prosecutions particularly, as this at Bombay is, may be considered as prosecuting not only in the name but on behalf of the crown, as the Attorney-General does in state-prosecutions, and entitled to the privileges of the Attorney-General. In reply, if by law such privilege did not, as I think it did, originally extend to prosecutors generally, though in practice modified in the courts of law, and reduced to a matter of discretion in the Court to allow or not. I cannot conceive, however, that by any similar usage in Courts Martial, or by the particular circumstances of the case, the court was justifiable in refusing to allow the Judge-Advocate to reply.

No. III.

FORMS.

No. 1.

Form of a Warrant empowering an Officer commanding a Body of Troops to convene a General Court Martial.

By his Excellency Lieutenant-General _____,
Commander-in-Chief of _____.

To Major-General _____, (or officer not under
the rank of a field-officer,) commanding _____.

GREETING.

By virtue of the power and authority in me vested by a warrant, under His Majesty's sign-manual, bearing date the twenty-fifth day of March, one thousand eight hundred and _____, authorising me to empower any officer (not under the rank of a field-officer) having the command of a body of troops belonging to the forces under my command, to convene General Courts Martial for the trial and punishment of mutiny and desertion, or any other offence committed against the rule of military discipline, by any officer or soldier under his command; I do hereby authorise and empower you to convene or cause to be assembled General Courts Martial for the trial of

offences committed by any officer or soldier under your command: every of which Courts Martial shall consist of a president, and of a competent number of other officers who can be conveniently assembled to attend the same; regard being always had, as well in the appointment of such president as in the rank and quality of the other officers composing such Courts Martial, to the rules prescribed by an act of parliament, entitled "An Act for punishing Mutiny and Desertion, and for the better Payment of the Army and their Quarters."

And I do hereby empower and authorise all such Courts Martial as are held by this warrant, to hear and examine all such matters and information as shall be brought before them, touching the misbehaviour of any commissioned officer or non-commissioned officers or soldier by mutiny, desertion, or otherwise, as aforesaid, and to proceed in the trial of such charges, and giving sentence and awarding punishment according to the powers and directions contained in the said act of parliament, and Articles of War, and particularly the parts thereof concerning the forces of the Honorable East India Company.

And whereas it is necessary to have military discipline kept up amongst the troops under your command; in as great exactness as possible, and as nothing can contribute more to retain the soldiers in due obedience to their officers, and to make them diligent in discharging the duty incumbent on them, than bringing delinquents to speedy justice, you are hereby directed when, and as often as the proceedings are

closed of any such Court Martial, legally constituted as aforesaid, to cause the said proceeding to be transmitted for my consideration, and that there may not be a failure of justice in any case from the want of a proper person authorised to act as Judge-Advocate, you are hereby further empowered to nominate and appoint a fit person from time to time to execute the duty of Judge-Advocate at any such Court Martial, for the more orderly proceedings of the same; and for executing the several powers, matters, and things herein expressed; these shall be as well to you as to the said Courts Martial, and to all others whom they may concern, a sufficient warrant and authority.

By order of Major-General _____, command-
ing _____
Given under my hand
and seal at _____ this
_____ day of _____ in
the year of our Lord
one thousand eight hun-
dred and _____

N. B. The words in italics in the preceding form are only required in warrants granted to officers commanding a body of the Honorable East India Company's forces; as officers and soldiers in its service are ruled and punished by the act 27 Geo. 2.

FORM OF A PRESIDENT'S WARRANT. No. 2.

Form of a President's Warrant.

By Major-General _____, commanding the _____, to Lieut. Colonel _____, _____ Battalion, _____ Regiment.

GREETING.

By virtue of the power and authority in me vested I do hereby constitute and appoint you, the said Lieutenant-Colonel _____, of the _____ battalion, _____ regiment, to be president of a General Court-Martial ordered to assemble on _____, the _____ day of _____, one thousand eight hundred and _____, for the trial of all such prisoners as may be brought before it.

You are, therefore, to assemble the said General Court-Martial accordingly, and to proceed to try all such prisoners, and to determine on all matters that shall be brought before you, according to the powers and provisions contained in the act or acts of parliament in that respect made and provided, and agreeably to the rules and customs of war and military discipline; and you are further to cause the proceedings of the said General Court-Martial to be laid before me for my approbation; and for so doing this shall be to you and to all concerned a sufficient warrant and authority.

By order of Major-General _____, commanding _____.

Given under my hand and seal at _____, this _____ day of _____, in the year of our Lord one thousand eight hundred and _____.

No. 3.

Form of a Judge-Advocate's Warrant.

By Major-General _____, commanding _____,
to Lieutenant _____.

GREETING.

By virtue of the power and authority in me vested, I do hereby constitute and appoint you, the said Lieutenant _____, to execute the office of Judge-Advocate at a General Court Martial to be holden at ten o'clock of the forenoon, _____ the _____ day of _____, one thousand eight hundred and _____.

You are, therefore, duly to execute the office of Judge-Advocate at the said General Court Martial according to the Articles of War; and the custom of war in the like cases; and also to do and perform such other matters and things as to the said office of Judge-Advocate now doth or usually hath appertained, and for your so doing this shall be to you and to all concerned a sufficient warrant and authority.

By order of Major General _____, commanding _____.

Given under my hand and seal at _____, this _____ day of _____, in the year of our Lord one thousand eight hundred and _____.

No. 4.

Summons of a Witness.

There is no prescribed form in which a witness shall be summoned to attend a General Court Martial; and witnesses are, therefore, required to attend by letter, of which the following form may be adopted, addressed to each of them by the Judge-Advocate.

Sir,

Your evidence being required on the part of the prosecution, (or of the defence, as the case may be,) on the trial of Lieutenant A. B. of the _____ battalion, _____ regiment, I do hereby summon you to attend accordingly as a witness at the General Court Martial ordered to assemble at _____, on Monday the _____ day of _____, at ten o'clock of the forenoon.

I have the honour to be, Sir,

Your most obedient servant,

C. D.

Judge-Advocate.

To Captain E. F.

H. M.

Regiment.

No. 5.

*Form of a Warrant issuable by Commanders-in-Chief
for carrying into Execution a Sentence of Death,*

By His Excellency Lieut. General _____, Com-
mander-in-chief of _____

To Major-General _____, commanding _____

Whereas power and authority have been vested in me by a warrant under His Majesty's sign-manual, bearing date the twenty-fifth day of March, one thousand eight hundred and _____, to convene or cause to be assembled General Courts Martial for the trial and punishment of mutiny and desertion, or any other offence committed against the rules of military discipline by any officer or soldier belonging to the forces under my command; and whereas further power and authority have been vested in me by the said warrant, when and as often as any sentence shall be given and passed by such General Courts Martial legally constituted and appointed, to cause such sentence to be put into execution, or to mitigate or remit the same as I shall judge best and most convenient for the good of His Majesty's service without waiting for His Majesty's further orders.

And whereas by a General Court Martial legally holden at _____, on the _____ day of _____ by virtue of a warrant issued by me under the authority aforesaid, _____, private in His Majesty's _____ regiment of foot, has been found guilty of _____ and has been sentenced to suffer death by being shot; which sentence and judgment of death thus given against the said _____ I have found it expedient for the good of His Majesty's service to

confirm, and to direct that the same shall be carried into execution.

I do therefore hereby require, that you, Major-General ———, do on Monday next, the ——— day of the present month of ———, between the hours of five and ten o'clock in the morning, carry the said sentence into execution by causing the said ——— to be shot dead; and for so doing this shall be to you, and to all others concerned, a sufficient warrant and authority.

Given under my hand and seal at ———, this ——— day of ———, in the year of our Lord one thousand eight hundred and ———.

*By Order of His Excellency
the Commander-in-Chief.*

No. 6.

*Form of the Proceedings of a General Court
Martial.*

At a General Court Martial holden at ——— on Thursday the ——— day of ———, one thousand eight hundred and ———, by virtue of a warrant from His Excellency Lieutenant-General ——— Commander-in-Chief. *

* It is to be particularly observed that all titles and designations are to be written at full length, and no abbreviations of any kind be inserted in the fair copy of the proceedings; and that numbers be never written in figures, but in words at full length.

PRESENT:

PRESIDENT,

Lieutenant-Colonel A. B., H. M.'s _____ regiment.

MEMBERS,

Lieut.-Col. C. D. _____	1st Bat. Regt. N. I.
Major E. F. _____	H. M. Regt.
Major G. H. _____	H. M. Regt.
Capt. I. J. _____	2d Bat. Regt. N. I.
Capt. K. L. _____	1st Bat. Regt. N. I.
Capt. M. N. _____	1st Regt. N. Cavalry.
Capt. O. P. _____	H. M. Regt.
Capt. Q. R. _____	H. M. Regt.
Capt. S. T. _____	1st Bat. Regt. N. I.
Lieut. U. V. _____	2d Regt. N. Cavalry.
Lieut. W. X. _____	H. M. Regiment.
Lieut. Y. Z. _____	1st Bat. Regt. N. I.
Lieut. B. A. _____	2d Bat. Regt. N. I.
Lieut. D. C. _____	2d Bat. Regt. N. I.

Captain F. E. _____, Deputy-Judge-Advocate-General.

Lieutenant William Stiles, of the _____ battalion, _____ regiment of native Infantry, appears as prisoner before the Court.

The orders directing the assembly of the Court, the President's and Judge-Advocate's warrants, are severally produced and read.

Q. Lieutenant Stiles, have you any exceptions to

any of the officers present sitting as members on your Court Martial? *

A. None.

OR,

Yes; I except to Lieutenant W. X. and Lieutenant Y. Z., because they have expressed an opinion on the subject about to be investigated.

The officers excepted to admit that they have expressed such an opinion, and withdraw; and the Court is closed.

The Court being again opened, Lieutenant Stiles is informed that his exceptions have been deemed valid; and Lieutenants W. X. and Y. Z. accordingly retire; Lieutenant H. G. and Lieutenant J. I., members in waiting†, are called into court.

Q. Has the prosecutor or the prisoner any exceptions to Lieutenant H. G. and J. I. sitting as members on this Court Martial?

A. None.

* This question is not put to the prosecutor for the reasons assigned in p. 19.; but the Judge-Advocate ought always to ascertain previously whether or not the prosecutor has any objections to any of the officers ordered as members of the Court Martial.

† These are not to be considered in the same light as the members in waiting who formerly took their seat at Courts Martial, but did not vote. But as it is sometimes understood, that exceptions will be made, officers are ordered to be in attendance in case of their being required as members; and should this not be the case, they return to their regiments as soon as the Court is sworn in.

The President, members, and Judge-Advocate, are duly sworn.

CHARGE.

Lieutenant William Stiles, of the _____ battalion, _____ regiment of native infantry, placed in arrest by me on the following charge, viz.

For highly unofficerlike conduct, in having been drunk on duty, while under arms, on the afternoon of the _____ day of _____.

RICHARD ROE, Major, *to stay*
Comdg. — Bat. — Regt. N. I.

HEAD QUARTERS AT _____

By order of His Excellency the Commander-in-Chief:

(Signed) L. K. _____

Adjutant-General.

Q. How say you, Lieutenant William Stiles, are you guilty of the charges just read, or not guilty?

A. Not guilty.

Major Richard Roe, commanding officer of the _____ battalion, _____ regiment, appears as prosecutor, and addresses the Court as follows.

The battalion, which I command, was paraded for muster on the evening of the first day of this month, and shortly after I had come upon parade, previous to the officers falling in, my attention was directed to Lieutenant Stiles by several of the officers observ-

ing him particularly. I was in consequence induced to turn round, when I saw Lieutenant Stiles reeling back and very near falling. He, however, recovered himself, and then said to me, in a very faltering voice, "Sir, I feel very unwell indeed," not wishing to ascribe his appearance to the effects of drinking. I replied, "Sir, you have my permission to leave parade." Lieutenant Stiles answered in a very particular manner, his words being indistinct and interrupted, "Sir, I am not tipsy; on my honor I am not." I then said, "Remain where you are," or words to that effect. During the whole of this time Lieutenant Stiles was very unsteady, making very frequent staggers.

At this time the mustering officer had arrived on parade, and I directed the officers to fall in. When the mustering officer and myself shortly after reached Lieutenant Stiles's company, the eighth, instead of stepping forward to deliver the muster rolls, he held them out in his hand, while he leant for support on the left front file of the seventh company. The mustering officer desired the orderly to call over the names, but he had scarcely called over six or eight, when Lieutenant Stiles gave the word to his company "Order arms," in such a tone of voice, and at so improper a time, that no doubt remained in my mind of his being in such a state of intoxication as to be unable to perform his duty. I, therefore, told him to leave parade, which he did; but went to his house in such a staggering manner, that, could there have been any doubt of his being intoxicated, this would have removed it.

Q. By the Judge-Advocate. Major Roe, do you wish to authenticate the above statement by your oath?

A. Yes, certainly.

The prosecutor, Major Roe, commanding officer, of the battalion ———, regiment ———, is duly sworn.

Q. By the Judge-Advocate. Are all the facts contained in the statement which you have just delivered to the Court true?

A. They are.

The prisoner having no questions to put to the prosecutor, the following evidence is called in support of the prosecution.

Lieutenant N. M. Adjutant of the ——— battalion, ——— regiment, called into Court and duly sworn.

Q. By the prosecutor. Was the battalion paraded for muster on the evening of the first day of this month?

A. It was.

Q. By the prosecutor. Did you observe Lieutenant Stiles on parade that evening?

A. I did.

Q. By the prosecutor. Describe to the Court Lieutenant Stiles's general manner and appearance on that evening?

A. I observed Lieutenant Stiles before the officers fall in, and he could then scarcely stand steady; after the officers were directed to fall in, I did not observe Lieutenant Stiles until he was leaving parade, when he went towards his house evidently in the manner of a person who was intoxicated.

Q. By the Judge-Advocate. Do you think Lieutenant Stiles was so intoxicated as to be unable to do his duty?

A. Yes; he could, as I have said before, scarcely stand.

Q. By the prisoner. Did you hear me speak on that evening?

A. No, I did not.

Q. By the prisoner. Then you conclude that I was intoxicated merely from my appearance?

A. Yes, entirely so.

Q. By the prisoner. Had I not been seriously ill just before the muster-evening, and only returned fit for duty the day before?

A. Yes.

Q. By the prisoner. Was not the muster-evening warm?

A. No, not particularly so.

Q. By the Court. Did you observe Lieutenant Stiles at any time on that evening leaning against the left front file of the 7th company?

A. No, I did not.

Q. By the Court. How was the battalion formed for muster on the evening of the first day of this month?

A. In line.

The witness Lieutenant N. M. withdraws.

Captain P. O., Deputy-Quarter-Master-General of _____, called into court and duly sworn.

Q. By the prosecutor. Did you muster the _____ battalion, _____ regiment, on the evening of the first day of this month?

A. I did.

Q. By the prosecutor. Did you particularly remark the prisoner on that evening?

A. Yes; my attention was attracted to him by his not stepping forward to deliver me the muster-roll of his company, as the other officers had done, when I observed him leaning against one of the sepoy's for support. He, however, made an attempt to come forward; and had I not got quickly out of his way, I would have received the point of his sword in my face. He succeeded in recovering himself, and I directed the orderly to call over the names of the company, but he had scarcely called over eight or ten, when Lieutenant Stiles called out to his men, "Order arms." Major Roe then ordered Lieutenant Stiles to go to his quarters, which he did; and left parade in so unsteady a manner, that it could have, in my opinion, proceeded only from intoxication.

Q. By the Judge-Advocate. In what manner and tone of voice did Lieutenant Stiles give the word to his men, "Order arms?"

A. In so extraordinary a manner, and in so strange a tone, that they could have been the effect of nothing but intoxication.

The witness Captain P. O. withdraws.

Lieutenant R. Q. of the ——— battalion, ——— regiment called into court and duly sworn.

Q. By the prosecutor. Did you hear Lieutenant Stiles address me on parade before the officers fell in on the evening of the first day of this month?

A. I did, I heard him say, Sir, I am not tipsy, I am not upon my honour, Sir, or words to that effect.

Q. By the prosecutor. In what manner and tone of voice did he address me at that time?

A. Evidently as if he was under the influence of liquor.

Q. By the prisoner. How near were you to me when you heard the words which you have now deposed to.

A. I was close to you, and Major Roe was about two paces distant.

Q. By the Court. From all that you observed of Lieut. Stiles's manner and appearance on that evening, do you think that he was so intoxicated as to be unable to do his duty?

A. Yes, I certainly do. I remarked him both before the officers fell in, and when he left parade, and he could neither stand steady, nor walk straight.

The witness Lieutenant R. Q. withdraws.

The prosecutor here closes the prosecution.

The prisoner being now put on his defence, requests the indulgence of three days in order to enable him to prepare it; with which request the Court complies, and is in consequence adjourned until Monday, the ——— day of the present month, at ten o'clock of the forenoon.

SECOND DAY.

MONDAY, ———

At a General Court Martial then held at ——— pursuant to adjournment.

Present the same members as on Thursday last.

Read over the proceedings of Thursday last. *

DEFENCE. The prisoner Lieut. William Stiles now addresses the Court as follows.

Mr. President and Gentlemen,

I now stand before you charged with an offence which might appear to admit of little extenuation. But, notwithstanding this unfavourable circumstance, I will yet venture to address you, as I flatter myself that the serious nature of the charge will in no manner influence your present decision.

My prosecutor, and the evidences adduced by him,

* The proceedings are merely read over in case the court consider it necessary; and if not, this entry is not requisite.

have deposed positively, that in their opinion I was much intoxicated on parade on the afternoon of the ———. I shall not attempt to invalidate this testimony; but I trust I shall prove to your satisfaction, that, previous to quitting my quarters to go to parade, I was perfectly sober. The surgeon of the corps will also bear witness to my late recovery from a severe illness, and to my present debilitated state. When such considerations are duly weighed, I cannot but hope that my unfortunate situation on the ——— will be ascribed merely to the effect of a sultry sun. On that day I had been very abstemious, and had only drunk a few glasses of wine. Unluckily I went to parade too early, and continued standing there exposed to the sun for nearly half an hour, before the officers assembled. It will not, therefore, be deemed unusual, when my extreme weakness is considered, that even a few glasses of wine might, under such circumstances, occasion intoxication.

If, then, it should appear to you, gentlemen, that I was sober previous to quitting my quarters, and that my health was so impaired by long sickness that the heat of the sun might have rendered me intoxicated by the little I had drank, I may hope for your clemency. To that alone should I have trusted, had I not flattered myself that I should be more entitled to your lenity by bringing before you every circumstance which could plead in my favour.

Before I conclude, permit me, gentlemen, to impress in your minds that my only dependence rests on a service in which I have passed my younger years.

Should your decision now deprive me of that sole dependence, it dooms me to want and ignominy — destitute of friends and resources, I have no support left but that commission, the preservation of which now depends on your verdict; let me then hope that your duty will not compel you to render that verdict more rigorous than what might be dictated by your private feelings.

The prisoner now proceeds to call the following witnesses in support of his defence.

T. S. a native servant of Lieut. Stiles, called into court and duly sworn.

Q. By the prisoner. Did you see me leave my house for parade on last muster evening, and in what state did I then appear?

A. Yes, and you were then perfectly sober.

The witness T. S. withdraws.

V. U. a native servant of Lieut. Stiles, called into court and duly sworn.

Q. By the prisoner. Did you see me leave my house for parade on last muster evening, and in what state did I then appear?

A. Yes, I did; and you were then perfectly sober; you had during the whole of that day drank three glasses only of port wine.

The witness V. U. withdraws.

X. W. Esquire, surgeon of the ——— battalion ——— Regiment, called into court and duly sworn.

Q. By the prisoner. Previous to the first day of this month had I not been in the sick list?

A. Yes.

Q. By the prisoner. When did you return me well?

A. On the thirty-first of last month.

Q. By the prisoner. Was my illness serious, and did it affect my strength?

A. Yes, your illness was very serious, and it reduced you to such a state of debility and weakness that I wished you to remain off duty as convalescent for some time longer. But you were so very anxious to be returned well, and there being no other than the usual cantonment duty to be done, that I complied with your request.

Q. By the prisoner. What effect, in your opinion, would a few glasses of wine, and exposure for a considerable time to an afternoon's sun have upon a person so weak and debilitated as I then was?

A. I certainly think that it might produce a considerable degree of intoxication.

Q. By the prosecutor. What induces you to form the opinion which you have just stated?

A. From repeated observation on the effect which wine or spirits, even in small quantities, and subsequent exposure to the sun, always have on persons recovering from a similar illness to that of Lieutenant Stiles.

Q. By the prosecutor. What was that illness?

A. Severe fever, which had in some degree affected his head.

Q. By the prosecutor. Do you think that three glasses of port wine could have produced the effect to which you have now deposed?

A. It depends on the size of the glasses, and whether or not Lieutenant Stiles had eaten any thing before drinking them.

Q. By the Judge-Advocate. Suppose that they were common wine-glasses?

A. I really cannot say, as the effect which they might have produced depends on circumstances with which I am unacquainted.

Q. By the Judge-Advocate. Cannot you form a probable opinion on the subject?

A. I really cannot.

Q. By the Court. Did you see Lieutenant Stiles, either on the afternoon or during the day, on the first of this month?

A. No, I did not.

Q. By the Court. Are you of opinion that from the state of Lieutenant Stiles's health, and from his standing a short time on parade on the afternoon of the first of this month, it is possible that, notwithstanding his subsequent intoxication, he might have left his quarters perfectly sober?

A. I certainly think that he might.

The witness Mr. H. W. withdraws.

The prisoner here closes his defence.

The prosecutor states that he does not wish to make any reply.

The trial is here finished, and the parties and witnesses are dismissed.

The Court is now adjourned until to-morrow forenoon at 11 o'clock.

THIRD DAY.

TUESDAY, _____

At a General Court Martial then helden at _____ pursuant to adjournment.

Present, the same members as yesterday.

The Court being closed, (and the fair copy of the proceedings having been read over, *) proceed to deliberate on their finding and sentence.

FINDING AND SENTENCE. — The Court, having maturely weighed and considered all that has been adduced in support of the prosecution, as well as what has been brought forward on the defence, are of opinion, that the prisoner, Lieutenant William Stiles, is guilty of the charge preferred against him, in breach

* In case the Court should think it necessary that the proceedings, or any part of them, should be read over.

of the Articles of War in such cases made and provided; and they do therefore adjudge him the said Lieutenant William Stiles to be cashiered.

E. F. A. B. LIEUT. COLONEL
Officiating Judge-Advocate. *and President.*

The Court having thus performed the painful duty of awarding punishment in strict conformity to an Article of War, which deprived them of all discretionary power, beg leave to recommend the case of Lieutenant Stiles to the merciful consideration of his excellency the commander-in-chief. For the Court are of opinion that it is highly probable, that the state of intoxication in which Lieutenant Stiles appeared on parade on the afternoon of the ——— proceeded not from any excess in drinking, but from the effect produced by a small quantity of wine, and exposure to the sun, on the weak and debilitated state of body of Lieutenant Stiles, who had scarcely recovered from a serious illness.

A. B. LIEUTENANT COLONEL
and President.

N. B. When the examination of witnesses does not extend to any length, the above mode of entering the questions and answers is best. But in cases where the examination is long, it would be sufficient to enter on the face of the proceedings, after having minuted that the witness was duly sworn, examined by the prosecutor, cross-examined by the prisoner, re-ex-

anned by the prosecutor, examined by the Court, and then to place in the margin merely Q. and A.

An interpreter may be sworn either at the beginning of a trial or at any stage of the proceedings, and a minute of his name and rank, and of his having been duly sworn, must then be entered on the face of the proceedings.

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